No. 96-243-CFX Title: Bernadine Suitum, Petitioner
v.
Tahoe Regional Planning Agency

Docketed: August 14, 1996 Court: United States Court of Appeals for the Ninth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Aug 12 1996 | Petition for writ of certiorari filed. (Response due September 13, 1996) |
| | Sep 4 1996 | Motion of Tahoe-Sierra Preservation Council for leave to file a brief as amicus curiae filed. |
| | Sep 6 1996 | Motion of Tahoe Lakefront Owners' Association for leave to file a brief as amicus curiae filed. |
| | Sep 13 1996 | Motion of Southeastern Legal Foundation for leave to file a brief as amicus curiae filed. |
| | Sep 13 1996 | Brief of respondent Tahoe Regional Planning Agency in opposition filed. |
| | Sep 25 1996 | Reply brief of petitioner Bernadine Suitum filed. |
| | Oct 15 1996 | Motion of Tahoe-Sierra Preservation Council for leave to file a brief as amicus curiae GRANTED. |
| | Oct 15 1996 | Motion of Tahoe Lakefront Owners' Association for leave to file a brief as amicus curiae GRANTED. |
| | Oct 15 1996 | Motion of Southeastern Legal Foundation for leave to file a brief as amicus curiae GRANTED. |
| | Oct 15 1996 | Petition GRANTED.<br>SET FOR ARGUMENT February 26, 1997.<br>********** |
| | Nov 26 1996 | Brief amici curiae of National Association of Home Builders, et al. filed. |
| | Nov 27 1996 | Brief amici curiae of Defenders of Property Rights, et al. filed. |
| | Nov 27 1996 | Brief amicus curiae of Tahoe-Sierra Preservation Council, Inc. filed. |
| | Nov 27 1996 | Brief amicus curiae of The Mayhews, et al. and Section 28 Partnership, Ltd. filed. |
| | Nov 27 1996 | Brief amicus curiae of Tahoe Lakefront Owners' Association filed. |
| | Nov 27 1996 | Brief amici curiae of American Farm Bureau Federation, et al. filed. |
| | Nov 27 1996 | Joint appendix filed. |
| | Nov 27 1996 | Brief of petitioner Bernadine Suitum filed. |
| | Nov 29 1996 | Brief amicus curiae of Institute for Justice filed. |
| | Nov 29 1996 | Brief amicus curiae of Building Industry Association of Washington filed. |
| | Dec 5 1996 | Order extending time to file brief of respondent on the merits until January 9, 1997. |
| | Jan 7 1997 | Brief amicus curiae of New Jersey filed. |
| | Jan 7 1997 | LODGING consisting of one copy each of two Pinelands Development reports submitted by counsel for amicus New Jersey. |
| | Jan 8 1997 | Brief of respondent Tahoe Regional Planning Agency filed. |
| | Jan 8 1997 | Brief amicus curiae of City of New York filed. |
| | Jan 8 1997 | Brief amicus curiae of Columbia River Gorge Commission |

No. 96-243-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | | filed. |
| | Jan 9 1997 | Brief amicus curiae of New York filed. |
| | Jan 9 1997 | Brief amicus curiae of American Planning Association filed. |
| | Jan 9 1997 | Brief amicus curiae of United States filed. |
| | Jan 9 1997 | Brief amici curiae of Natl.Trust for Historical Preservation in the U.S., et al. filed. |
| | Jan 9 1997 | Brief amicus curiae of League to Save Lake Tahoe filed. |
| | Jan 9 1997 | Brief amici curiae of James Nicholas, et al. filed. |
| | Jan 9 1997 | Brief amici curiae of National League of Cities, et al. filed. |
| | Jan 9 1997 | Brief amici curiae of Pete Wilson, Governor, et al. filed. |
| | Jan 9 1997 | Brief amici curiae of Nevada, et al. filed. |
| | Jan 10 1997 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| | Jan 10 1997 | LODGING by respondent: (1) Tahoe Regional Planning Agency Code of Ordinances; (2) Tahoe Regional Planning Agency Goals and Policies; (3) Ninth Circuit Oral Argument Tr., Suitum v. TRPA, No. 94-15768. (Box-1 copy of each) |
| | Jan 15 1997 | CIRCULATED. |
| | Jan 21 1997 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| | Feb 5 1997 | Reply brief of petitioner Bernadine Suitum filed. |
| | Feb 7 1997 | Record filed. |
| | Feb 10 1997 | Record filed. |
| | Feb 26 1997 | ARGUED. |

(1)

Supreme Court, U.S.
FILED

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No. _____

In the

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,
*Respondent*.

## Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Must a property owner sell transferable development rights (TDRs) and apply for agency approval of the sale in order to ripen a takings claim under the *Williamson County* final decision requirement:

a) when the regulatory agency has already conclusively determined that no viable use of her parcel of land will be permitted;

b) when a TDR transfer will not allow her to make any use of her parcel of land; and

c) when the maximum extent of TDRs available for transfer are already definite and certain, and can be valued by normal appraisal methods?

## PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Ninth Circuit were Bernadine Suitum and the Tahoe Regional Planning Agency.



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No. _____

**In the**

# Supreme Court of the United States

**October Term, 1996**

BERNADINE SUITUM,
*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,
*Respondent*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

## OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 359 (9th Cir. 1996), and is reproduced as Appendix A (App.). Page references are to the version in the Appendix.

## JURISDICTION

The decision of the Ninth Circuit was entered April 1, 1996. Petitioner filed a timely petition for rehearing, and rehearing was denied on May 13, 1996. Appendix B. The petition for writ of certiorari has been timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The relevant portions of the Tahoe Regional Planning Agency (TRPA) code are excerpted in Appendix F at 1-11.



## STATEMENT OF THE CASE

Respondent TRPA[1] has determined that petitioner Bernadine Suitum cannot develop her 18,300 square foot parcel of land located in a developed residential subdivision in Incline Village, Nevada. This fact would normally be a *per se*, categorical violation of the Takings Clause, which prohibits the government from taking private property for public use unless just compensation is paid to the landowner. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court held that the denial of all economically beneficial or productive use of land is a Takings Clause violation.

But Mrs. Suitum could not get the federal court to rule on the merits of her case. TRPA had artificially carved up the necessary elements of land development--separating the right to build in a given year (an allocation) from the right to build a structure (a residential development right) from the right to occupy a certain amount of ground space (land coverage).

These elements would seem irrelevant to Mrs. Suitum, since TRPA had forbidden her from developing her lot. But TRPA has deemed these elements transferable, and argued that Mrs. Suitum must go through the process of selling them before she can bring a court challenge to TRPA's ban on the development of her land.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985), this Court held that the government must first reach a

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[1] TRPA regulates property in the Lake Tahoe region. It was formed by agreement between the States of California and Nevada--an agreement ratified by Congress in the 1969 Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969), and amended in 1980, Pub. L. No. 96-51, 94 Stat. 3233; Cal. Government Code § 66801; Nevada Rev. Stat. § 277.200.

definitive position on the amount of development its regulations will allow on a parcel of land before the owner of that land can bring a court challenge to the application of those regulations. *Id.* The court below applied this "final decision" ripeness doctrine to Mrs. Suitum's case and held it was not ripe because she had not sold development rights from her parcel of land to other owners of land. *Suitum v. Tahoe Regional Planning Agency*, App. A at 9.

### A. TRPA Prohibited Mrs. Suitum from Developing Her Lot

Mrs. Suitum and her late husband acquired the Incline Village property in 1972. On three sides of the parcel are lots with residences, and the fourth side borders on a paved street with a curb, gutter, and all utilities necessary for a single-family residence. First Amended Complaint, Court Record (CR) 36, ¶ 3.

In 1989, Mrs. Suitum submitted to TRPA plans to build a residence on the parcel. TRPA evaluated Mrs. Suitum's land and determined that the parcel was located in a Stream Environment Zone (SEZ).[2]

TRPA's policy is that "no new land coverage or other permanent land disturbance shall be permitted" in a Stream Environment Zone except for certain limited public uses such as outdoor recreation facilities--uses which are incompatible

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[2] These are areas which, according to TRPA, "provide surface water conveyance from upland areas into Lake Tahoe and its tributaries." *See* excerpts from Regional Plan for the Lake Tahoe Basin, Goals and Policies, Tahoe Regional Planning Agency, September 17, 1986, contained in Appendix E at 1 (from a document filed by TRPA in the District Court, as Exhibit B to the Affidavit of Susan E. Scholley in Support of Motion for Summary Judgment, CR 66).



with Mrs. Suitum's residential neighborhood.[3] Enforcing this policy, under its 1987 Plan TRPA designated the property ineligible for development. As a result, there is absolutely no use to which Mrs. Suitum can put her land.

Mrs. Suitum appealed the determination that she could not build on her lot because of its location in a Stream Environment Zone. After a public hearing, the TRPA Governing Board denied the appeal on November 29, 1990.

### B. Mrs. Suitum Filed a Takings Claim with the District Court Seeking Compensation for TRPA's Denial of Economically Beneficial Use of Her Property

Mrs. Suitum then filed a lawsuit in the United States District Court for the District of Nevada, alleging that TRPA's application of its regulations and ordinances to her property *inter alia* violated her civil rights under the Fifth and Fourteenth Amendments to the United States Constitution, and took her property without payment of just compensation.[4]

This Court held in *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1015, that government regulation of property is a categorical violation of the Takings Clause when the "regulation denies all economically beneficial or productive use of land." The *Lucas* Court described this per se rule as applying "typically" to regulations "requiring land to be left in its natural state." *Id.* at 1018. TRPA's ban on "additional land coverage or other permanent land

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[3] Appendix E at 1-2; *see also* TRPA Code of Ordinances (TRPA Code) § 20.4.B, App. F at 4-7.

[4] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 42 U.S.C. § 1983. The original complaint was filed on January 28, 1991 (CR 1). A First Amended Complaint was filed on September 16, 1992 (CR 36).

disturbance" in a Stream Environment Zone, TRPA Code § 20.4, App. F at 4, requires that Mrs. Suitum leave her property in its natural state.

### C. The District Court Inquired About the Transferable Development Rights Process

When TRPA moved for summary judgment in the District Court, the court focused on the issue of "transferable development rights," or TDRs. In an order dated November 23, 1993, the district judge acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred *to* the property at issue." App. D at 3.

Under TRPA's Code it is possible for owners of property located in a Stream Environment Zone to transfer to others certain development rights. Because "the transfer of rights is the *only* avenue not yet pursued" by Mrs. Suitum, App. D at 3, and TRPA claimed "that an application for transfer is the only 'meaningful application' that can be made in this case," the court asked for briefing on the relevance of these rights to the ripeness of Mrs. Suitum's claims against TRPA. App. D at 4.

The land development process adopted by TRPA requires that a property owner possess three distinct "rights" in order to develop property that TRPA has deemed suitable for development. These rights, which can be transferred to development-eligible lots, are as follows:

#### 1. Development Allocations

TRPA distributes 300 residential development allocations each year, as the means to limit the number of residential units annually constructed in the Lake Tahoe region.[5] A property owner needs one allocation for every

[5] Affidavit of Lyn Barnett (Barnett Aff.), Exhibit A to Defendant TRPA's Memorandum Concerning Its Transfer of Development Program at ¶ 10, CR 74.



unit to be built, and allocations which are not used within one year are forfeited. Allocations do not come automatically with a parcel of land, but must be obtained through the county in which one's land is located. Mrs. Suitum's county reserves 6 of its 60 annual allocations for parcels that TRPA deems ineligible for development. These are distributed by lottery.[6]

#### 2. Residential Development Rights

Each vacant residential parcel automatically has one residential development right, authorizing the building of one residential unit. Multi-unit development requires the owner to acquire residential units from other properties.[7] An undeveloped parcel in a Stream Environment Zone can transfer an additional three "bonus units." TRPA Code §§ 35.2.C, 35.2.D(4)(b), App. F at 10-11.

#### 3. Land Coverage

Land coverage is the area of a lot that can be covered by an impervious surface. Each lot, based on its category, has a percentage of its area allowed as "base coverage." TRPA Code § 20.3.A, App. F at 1. Unused base coverage can be transferred to another parcel, up to certain limits. The base coverage for land in a Stream Environment Zone is 1% of the size of the lot. TRPA Code § 20.3.A, App. F at 1. Thus, Mrs. Suitum is eligible to transfer to another property owner 183 square feet of additional land coverage on the buyer's land. *Suitum v. Tahoe Regional Planning Agency*, App. [illegible] at 6.

TRPA's ordinances establishing the transfer process, excerpted in Appendix F, definitively determine whether a particular parcel of land in a Stream Environment Zone possesses the transferable development rights fabricated by TRPA. Unused base land coverage may be transferred.

[6] Barnett Aff. at ¶ 11.

[7] Barnett Aff. at ¶ 8.

TRPA Code § 20.3.C(2)(c), App. F at 2. A residential allocation may be transferred, if one was obtained from the county. TRPA Code § 34.3.A, App. F at 8-9. Residential development rights may be transferred from vacant parcels. TRPA Code § 34.2.A, App. F at 7. In all of these cases, TRPA conditions the transfer of these development rights upon the permanent retirement of the parcel of land by its owner--accomplished by recording deed restrictions "permanently removing the development rights" from the land. TRPA Code §§ 20.3.C(7)(a), App. F at 3-4; 34.2.B, App. F at 7; 34.5.A, B, H, App. F at 10.[8] In other words, a property owner such as Mrs. Suitum, with vacant land in a Stream Environment Zone, may transfer unused land coverage, one residential development right plus three bonus units, and a residential allocation (if one was won in a lottery)--provided she has agreed to keep the land forever in its natural state. TRPA Code §§ 20.3.C(7), App. F at 3; 34.5, App. F at 9.

For each transferable development right, Mrs. Suitum's eligibility as a transferor is straightforward: the conclusive factors are whether a parcel is in a Stream Environment Zone (it is), is vacant (it is), has unused base land coverage (it does), has a residential allocation (she did not enter the lottery for one), and is to be "permanently retired." TRPA's approval is not required to establish the right to be transferred, but instead is required to allow the transfer to take place. *See* Transfer Approval Form, reproduced in Appendix G at 1-3.[9] The TRPA approval process makes no determination on the use of Mrs. Suitum's property

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[8] For land in a Stream Environment Zone, this "retirement" provides for three additional "residential bonus units," allowing the acquirer of the rights to construct three residential units if that acquirer has otherwise qualified to use those rights. TRPA Code § 35.2.C-D, App. F at 10-11.

[9] This form was Exhibit "ff" to the Barnett Aff.



or on the rights she has to transfer. Rather, TRPA determines the eligibility of the *recipient* to use the rights. TRPA Code §§ 20.3.C, App. F at 1; 34.2.C-D, App. F at 7-8; 34.3.B-D, App. F at 9.

### D. The District Court Refused Jurisdiction on the Ground That TRPA Had Yet to Reach a Final Decision as to the Extent of Use of Mrs. Suitum's Property

After the parties briefed the transferable development rights issue, the District Court considered the ripeness of Mrs. Suitum's lawsuit. Under this Court's *Williamson County* decision, a property owner does not have a ripe claim that the application of a regulation to her property violates the Takings Clause if the property owner

> has not yet obtained a final decision regarding how [she] will be allowed to develop [her] property.

*Williamson County*, 473 U.S. at 190. This Court explained

> the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations ... simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

*Id.* at 191.

*Williamson County* specifically discussed development plans and variances that would allow development as the types of applications a property owner must submit in order to satisfy this "final decision" doctrine. 473 U.S. at 187-88. The District Court conceded that these types of applications were not an option for Mrs. Suitum, calling the transfer of development rights "the only avenue not yet pursued." Appendix C at 2.

In an order dated March 30, 1994, the District Court granted TRPA's motion for summary judgment, on the ground that the case was not ripe because TRPA had not ruled on the eligibility of another party to receive from Mrs. Suitum the transfer of development rights. App. C at 4. The court explained:

> Absent an application to transfer development, and a final decision on such application, we cannot know whether [Mrs. Suitum's] land indeed is unusable. Without a decision as to transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with [Suitum's] reasonable investment-backed expectation, cannot be assessed.

App. C at 4. Although TRPA had submitted evidence of the value of development rights, *see Suitum*, App. A at 11, the District Court concluded that these rights could not be valued absent an application to transfer them. App. C at 4.

### E. The Ninth Circuit Held Mrs. Suitum's Takings Claim Was Not Ripe Because TRPA Had Not Determined Whether Another Landowner Could Use Her Development Rights

Mrs. Suitum timely appealed this judgment to the Ninth Circuit. In a published decision, the Ninth Circuit affirmed the judgment. The court below analogized the transferable development right process to the submission of a development plan or variance request, as "the TDR program effects the same purpose: facilitating alternative uses of the property." *Suitum*, App. A at 9. The court concluded that "transfer of development rights is a 'use' of SEZ property." *Id.*, App. A at 10.

The Ninth Circuit held that Mrs. Suitum's case is not ripe for review:

> Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property.
>
> ....
>
> Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. ... Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development ... and thus cannot know the regulations' full economic impact."

*Suitum*, App. A at 9 (citations omitted).



The Ninth Circuit acknowledged that it already knew what development rights Mrs. Suitum could transfer, *Suitum*, App. A at 6, and it acknowledged that TRPA introduced evidence of the value of those rights. *Id.*, App. A at 11. Nonetheless, it required Mrs. Suitum's "pursuit" of the transfer of these rights, including an application for approval of the use of those rights by another landowner, before the court could determine the extent of development permitted on her land and the economic impact of TRPA's regulations on her property.

Mrs. Suitum timely filed a petition for rehearing, which was denied on May 13, 1996. App. B. She now files this petition for writ of certiorari, hoping that this Court will decide whether TRPA can, by inventing a device such as a transferable development rights program, avoid paying the just compensation *Lucas* entitles her.

## REASONS FOR GRANTING THE WRIT

The *Williamson County* ripeness doctrines for cases under the Takings Clause often confound property owners,

land use law practitioners, and the courts.[10] The Ninth Circuit has compounded the confusion by its application of the final decision ripeness doctrine in this case. The court below requires Mrs. Suitum to apply for administrative approval of the use of transferable development rights by another landowner in order to ripen her takings claim. This holding severs the final decision ripeness requirement from its doctrinal underpinning--which is to allow courts to analyze takings claims in the context of a definitive determination of the extent of development allowed on the subject property. The Ninth Circuit has taken a doctrine that aims for certainty and rendered it uncertain, as there is no limit to the number of irrelevant procedures that a property owner may be forced to utilize.

In this case, the Ninth Circuit has held that a property owner may not challenge land use regulations under the Takings Clause even when she has an absolutely final decision precluding any development on her particular parcel of land. This decision could potentially nullify the *Lucas* categorical taking doctrine, as a government agency banning all productive use of real estate can shut the affected property owners out of court merely by contriving TDR programs. The court below based its holding on the assumption that the value of intangible rights cannot be appraised by a court

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[10] For a survey of the large body of cases grappling with these issues, *see, e.g.*, Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992); Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).



unless the owner of the rights actually sells them. This assumption conflicts with the normal legal practice in valuing assets, and conflicts in particular with the most recent decision of the Seventh Circuit on that issue. The Ninth Circuit's misunderstanding of the final decision doctrine, and its holding that transferable development rights must be sold in order to be valued by a court, have deprived a property owner of the ability to protect her constitutional rights in a judicial forum. This case raises an important issue for this Court to resolve, Supreme Court Rule 10(c), and conflicts with the reasoning of the Seventh Circuit on an important issue, Supreme Court Rule 10(a).

## ARGUMENT

### I

### THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE IF THE TRANSFER OF DEVELOPMENT RIGHTS TO THIRD PARTIES IS A USE OF THE TRANSFEROR'S LAND FOR PURPOSES OF THE WILLIAMSON COUNTY FINAL DECISION RIPENESS DOCTRINE

The Ninth Circuit has held that Mrs. Suitum's transfer of development rights would be a "use" of her property, for purposes of the *Williamson County* final decision ripeness doctrine. *Suitum*, App. A at 10. This ruling departs from this Court's ripeness precedents, which define "use" of land as building on or development of land. *Williamson County*, 473 U.S. at 190; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351-52 (1986). The Ninth Circuit's approach has the further consequence of threatening to nullify the *Lucas* per se takings rule, which holds that the denial of all beneficial or productive use of land is a violation of the Takings Clause. *Lucas*, 505 U.S. at 1015.

### A. Transferable Development Rights Have No Relevance to the Final Decision Ripeness Doctrine, Which Serves the Purpose of Allowing the Court to Determine What Development Will be Allowed on a Property Owner's Land

The Court below based its decision that Mrs. Suitum's case was not ripe on the "final decision" ripeness doctrine, first expressly articulated in the *Williamson County* opinion, 473 U.S. at 186-91. *Suitum*, App. A at 8.

This doctrine was adopted by the Court for cases in which a property owner alleges that a regulation restricting development, as applied to his land, has an unconstitutional economic impact on his property. *Williamson County*, 473 U.S. at 191, 199. In order to assess this impact, courts must know the maximum extent of development that the government regulation will allow--a property owner needs to have "obtained a final decision regarding how it will be allowed to develop its property." *Id.* at 190.

This Court in *Williamson County* adopted the final decision doctrine after surveying unsuccessful takings claims. 473 U.S. at 186-88. In each case revisited by the Court, there was a possibility that some development would be allowed on the subject property. A "variance" or "waiver" could have been sought by the property owner in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 297 (1981). *Williamson County*, 473 U.S. at 187. A "plan for development of their property" was not yet submitted in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Williamson County*, 473 U.S. at 187. The rejection of the building plan in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136-37 (1978), did not foreclose the possibility that other proposed structures would be approved. *Williamson County*, 473 U.S. at 187.

The Court in *Williamson County* concluded that the amount of development allowed on a piece of property is the essential factor in challenges based on the economic impact



of regulations. 473 U.S. at 190. In that particular case, the owners had not applied for available variances. 473 U.S. at 188-89, 191. Thus, the case was not ripe for court review, as the government had not "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.

This holding was reemphasized in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. at 351:

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

The *MacDonald* Court considered whether "the denial of only one intense type of residential development," 477 U.S. at 352 n.8, satisfied the final decision ripeness doctrine. This Court described the necessary final decision as one "of the type and intensity of *development* legally permitted *on the subject property*." 477 U.S. at 348 (emphasis added). As there was "the possibility that some development will be permitted," the takings question was not yet ripe. 477 U.S. at 352.

There is no ambiguity concerning the amount of development that TRPA will allow on Mrs. Suitum's property. TRPA bans "additional land coverage or other permanent land disturbance" on Stream Environment Zone property. TRPA Code § 20.4, App. F at 4. The District Court expressly found that Mrs. Suitum "may not develop or build on the parcel of land she owns." App. D at 3. There were no variances or other procedures available to allow her to develop her land, as the transfer of development rights was "the only avenue not yet pursued." App. C at 2. Under *Williamson County*, 473 U.S. at 190 ("final decision regarding how it will be allowed to develop its property"), and *MacDonald*, 477 U.S. at 348 (final decision concerning "development legally permitted on the subject property"), Mrs. Suitum's case should have been ripe for court review.

The Ninth Circuit determined that Mrs. Suitum's case was not ripe by concluding that the transfer of development rights from her property to someone else's land is a "use" of her property. *Suitum*, App. A at 10. The court acknowledged that "in the more typical scenario" the necessary final decision is the result of "modified development plans or requests for variances." *Id.* at 9. In finding that the transfer of development rights "effects the same purpose" as variance or building plan applications, the court abandoned the very purpose of the final decision doctrine: to determine "the type and intensity of *development* legally permitted *on the subject property*." *MacDonald*, 477 U.S. at 348 (emphasis added). The court below *explicitly rejected* this rationale:

> That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

*Suitum*, App. A at 10 (emphasis in original). The Ninth Circuit cited no authority for the departure from this Court's ripeness precedents. *Id.*

### B. The Lucas Per Se Takings Category Is in Jeopardy if Transferable Development Rights, Which Require "Permanent Retirement" of the Land from Which They Are Transferred, Are Considered a Use of the Transferor's Land

The Ninth Circuit's determination that the transfer of development rights to someone else's property is a "use" of the transferor's property, *Suitum*, App. A at 10, could nullify the *per se* category of Takings Clause violations expressly established by this Court in *Lucas*.

The *Lucas* opinion reaffirmed this Court's

> frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.



505 U.S. at 1019 (emphasis added). A Takings Clause violation in such cases is "categorical," that is, "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 1015. When all "economically productive use" of land is forbidden, under *Lucas* the Takings Clause is violated unless the forbidden use could have been prohibited under common law nuisance doctrine. *Id.* at 1029.

*Lucas* focused on actual *use* of the land being regulated. The *per se* category of takings was defined as

> regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state.

*Lucas*, 505 U.S. at 1018. This categorical violation of the Takings Clause is variously described as a denial of "all economically beneficial or productive use," *id.* at 1015, of "economically viable use," *id.* at 1016 (quoting *Agins*, 447 U.S. at 260), "of all economically feasible use," *id.* at 1016 n.7, and of "all economically valuable use," *id.* at 1028. Every way that it is described, at the heart of this concept is whether any activity can take place on the land that economically benefits the landowner.

Mrs. Suitum's case falls squarely within the *Lucas* category of *per se* Takings Clause violations. She "may not develop or build on the parcel of land she owns." App. D at 3. In short, she can make no use of it. In *Lucas*, this Court recognized that "the erection of any habitable or productive improvements" on one's land is "the essential use of land." 505 U.S. at 1031 (internal quotation marks and citation omitted). This essential use has been denied Mrs. Suitum, yet the Ninth Circuit has held her case unripe.

This holding could eviscerate the *Lucas* categorical taking doctrine. If the transfer of a development right is a "use" of land, then *all* use of land is not denied whenever the regulatory body fabricates a TDR program. Government can simultaneously freeze someone's property as open space but provide to her in return "new rights" that are transferable--"rights" that can take any form, even a "coupon" entitling the recipient to a discounted application fee. Under the Ninth Circuit's holding, although the property owner would be forbidden from using her land, her legal challenge to the regulation is delayed indefinitely while she tests the marketability of each and every new transferable right.

In Mrs. Suitum's case, in order to transfer her development rights she must "permanently retire" her parcel. TRPA Code §§ 20.3.C(7)(a), App. F at 3; 34.2.B, App. F at 7; 34.5.A, B, H, App. F at 10. Thus, her land must "be left substantially in its natural state"--the prototypical *Lucas per se* taking. *Lucas*, 505 U.S. at 1018. Under *Lucas*, Mrs. Suitum would automatically be entitled to just compensation. But instead of determining how much money TRPA owes Mrs. Suitum, the Ninth Circuit has banished her claim from the courtroom.

## II

## THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS OVER WHETHER A PROPERTY OWNER MUST FIND SOMEONE TO BUY A PROPERTY INTEREST IN ORDER FOR THE COURT TO DETERMINE THE EXTENT OF THE ECONOMIC IMPACT OF A REGULATION ON HER LAND

The Ninth Circuit requires that Mrs. Suitum find third parties willing to buy her transferable development rights before the court will consider her takings claim ripe. *Suitum*, App. A at 9. The court below justifies this requirement by deeming it necessary for determining the "full economic impact" of the TRPA regulations that Mrs. Suitum seeks to challenge. *Id.* This deviation from this Court's final decision ripeness precedents conflicts with the Seventh Circuit's decision in *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258, 260-61 (7th Cir. 1995). This Court should issue a writ of certiorari to settle this conflict and decide whether a property owner must find potential purchasers of a property interest before a takings claim can be held ripe for adjudication.



### A. Even if TRPA's Creation of Transferable Rights Constitutes a "Permitted Use" of Mrs. Suitum's Property, the Nature and Extent of That "Use" Has Been Fully Established, Thereby Satisfying Williamson County's Final Decision Ripeness Doctrine

As detailed in Section I.A., *supra*, the final decision ripeness doctrine requires that property owners obtain from a regulatory body,

> a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

*Williamson County*, 473 U.S. at 191.

A property owner making an as-applied takings challenge, based on the economic impact of a regulation, must bring to the court a "final and authoritative determination" from the government of the "type and intensity" or "nature and extent" of development permitted on her land under the challenged regulation. *MacDonald*, 477 U.S. at 348, 351.

The Ninth Circuit has termed the transfer of development rights to be a "use" of Mrs. Suitum's land, and has concluded:

> Without an application for the transfer of development rights, TRPA is foreclosed from

> determining the extent of the use of Suitum's property.

*Suitum*, App. A at 9.

Although petitioner contends that a transfer of development rights is not a use of the transferor's land, *see* Section I.A., *supra*, even if it were a "use," the "nature and extent" of this use is not at all uncertain. Under TRPA's Code of Ordinances, Mrs. Suitum possesses the following transferable rights:

1. Land coverage of 183 square feet. *Suitum*, App. A at 6; TRPA Code §§ 20.3.A, App. F at 1; 20.3.C(2)(c), App. F at 2.

2. One residential development right, TRPA Code § 34.2, App. F at 7, plus three residential bonus units for retiring Stream Environment Zone property, TRPA Code § 35.2.D, App. F at 11.

These rights are defined in the TRPA Code. They are not dependent on TRPA's approval, but depend on objective facts already established: Mrs. Suitum's parcel is vacant, *see* TRPA Code § 34.2.A, App. F at 7 (parcel transferring residential development right must be vacant); TRPA has determined that Mrs. Suitum's parcel is in a Stream Environment Zone, *see* TRPA Code § 35.2.D, App. F at 11 (retired land in Stream Environment Zone can transfer 3 bonus units); and Mrs. Suitum's lot is 18,300 square feet in size, *see* TRPA Code § 20.3.A, App. F at 1 (base land coverage is 1% of lot size for Stream Environment Zones).

The third transferable development right she does not have. Mrs. Suitum must enter and win a lottery in order to receive an allocation. Barnett Aff. at ¶ 11.

The TRPA approval process that the Ninth Circuit requires Mrs. Suitum to go through is *not approval to market the TDRs*. The application that must be submitted is an approval form for *the actual transfer to* the receiving parcel which must already be identified. App. G at 1-3 (Transfer Approval Form). The process is irrelevant to the



determination of the development rights Mrs. Suitum possesses, and instead determines whether the designated recipients of these rights may use them to develop their own land.

Under *Williamson County*, 473 U.S. at 190, and *MacDonald*, 477 U.S. at 348, Mrs. Suitum's takings claim is ripe even if TDRs are a "use" of her property, as the extent, nature, and type of these rights has been conclusively determined. The Ninth Circuit admitted that these rights are already known, in a self-contradictory statement:

> Without attempting to transfer *the rights she currently possesses*, Suitum cannot know the nature and extent of permitted development
> ....

*Suitum*, App. A at 9 (emphasis added) (internal quotation marks and citation omitted). If "permitted development" means the transfer of development rights, then the "nature and extent" of these rights has been definitively established.

### B. The Final Decision Ripeness Doctrine Is Satisfied When the Economic Impact of the Regulation on the Subject Property Is Established--Regardless of Whether an Actual Market Transaction Has Occurred

If a regulation does not deny all beneficial use of a landowner's property--is not in the *Lucas per se* takings category--it can still violate the Takings Clause. This Court, in the *Penn Central* opinion, set forth a number of factors to be considered on an "ad hoc" basis to determine if a regulation violates the Takings Clause, including its "economic impact," and the "extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

The final decision ripeness requirement was developed in light of those two *Penn Central* factors, on the reasonable assumption that reviewing courts are capable of evaluating "the economic impact of the challenged action and

the extent to which it interferes with reasonable investment-backed expectations." *Williamson County*, 473 U.S. at 191. In the decision below, however, the Ninth Circuit held that the value of Mrs. Suitum's remaining property interests could not be determined absent a fully consummated third-party market transaction:

> Without attempting to transfer the rights she possesses, Suitum cannot know the nature and extent of permitted development, ... and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations.

*Suitum*, App. A at 9 (citation omitted).

There is no basis in either logic or law for the Ninth Circuit's holding that the economic value of Mrs. Suitum's transferable development rights cannot be determined unless she finds someone to buy them. Determining the value of TDRs is no different from determining the value of any other tangible or intangible asset. Such valuations are performed by the courts, without an actual transaction, all the time--based on expert testimony concerning appraised values. *See, e.g., Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986) (existence of speculative market for overregulated property was established and should be considered by trial court in determining merits of takings claim). Indeed, the Ninth Circuit acknowledged in this very case that the trial court accepted testimony on the value of these TDRs submitted by TRPA. *Suitum*, App. A at 10-11. Yet it held that Mrs. Suitum's claim was not ripe because her transferable development rights must be sold in order to be valued! *Suitum*, App. A at 9.

*Williamson County's* final decision ripeness doctrine is satisfied when the economic impact of the regulation on the subject property is established. Here, the value of both Mrs. Suitum's land *and* TRPA's fabricated development rights could be fully determined at the time Mrs. Suitum



filed her takings claim, without recourse to a third party market transaction. The decision below adds an additional, unnecessary step that has never before been required to establish a ripe takings claim under *Williamson County*. Mrs. Suitum's claim was ripe and should have been adjudicated.

### C. The Seventh Circuit Held in the Marusic Liquors Case That the Final Decision Ripeness Doctrine Does Not Require That a Property Owner Attempt to Transfer a Property Interest in Order for the Court to Assess the Economic Impact of a Regulation on That Interest

In addition to conflicting with ordinary legal practice concerning the valuation of assets, the decision below conflicts with the most recent case from the Seventh Circuit considering the issue, *Marusic Liquors, Inc. v. Daley*, 55 F.3d at 260. In *Marusic Liquors*, a property owner was confronted with the argument that his takings challenge to a regulation affecting an intangible right created by the government--a liquor license--was unripe because he had not attempted to sell his business. *Marusic Liquors*, 55 F.3d at 260. The Seventh Circuit held that the case was ripe under the final decision doctrine of *Williamson County*. *Id.* at 261.

*Marusic Liquors* reviewed an ordinance that placed restrictions on the transfer of liquor licenses in certain Chicago neighborhoods--nonrelatives could acquire no more than a 5% interest in such businesses each year. 55 F.3d at 260. The District Court dismissed the case, "ruling that the claims are unripe because Marusic has no immediate plan to sell the business." *Id.*

The Seventh Circuit reversed, expressly finding the case ripe under *Williamson County* even though the owner had not attempted to sell his license. 55 F.3d at 261. The Court held that "the ordinance itself embodies a conclusive decision about transferability" that had immediate impact on the value of the business even though it was "an open

question whether, and if so when, Marusic will try to sell the store." *Id.*

The provisions of the TRPA Code of Ordinances creating the development rights program similarly "embod[y] a conclusive decision about transferability." These provisions define the rights that Mrs. Suitum has available for transfer. TRPA Code §§ 20.3.A, App. F at 1; 20.3.C(2)(c), App. F at 2; 34.2, App. F at 7; 35.2.D, App. F at 11. Under the final decision doctrine of *Williamson County*, 473 U.S. at 191, TRPA has reached "a final, definitive position" concerning the existence of Mrs. Suitum's development rights. The Ninth Circuit and the Seventh Circuit are in conflict over whether Mrs. Suitum has a ripe takings claim. This Court should grant the petition for writ of certiorari to resolve this conflict.

## CONCLUSION

Bernadine Suitum has received a final, definitive decision from TRPA on the uses to which she can put her land: there are none. This Court's decision in *Lucas v. South Carolina Coastal Council* affirmed that when a regulation "denies all economically beneficial or productive use of land," this action is a "categorical" violation of the Takings Clause. 505 U.S. at 1015.

But despite TRPA's final decision prohibiting Mrs. Suitum from building anything on her property, the Ninth Circuit ruled that her takings claim was not ripe for adjudication.

The Ninth Circuit opinion in this case refuses jurisdiction over a ripe constitutional claim, undermines the *Lucas* decision, and creates a conflict with the Seventh Circuit. Whether the sale of transferable development rights is a use of the seller's property, and whether these rights must be sold in order to be valued by a court, are critical questions that will determine if property owners can protect



their constitutional rights in a judicial forum. Petitioner respectfully urges this Court to grant this petition for writ of certiorari to decide these important issues and resolve the circuit conflict.

DATED: August, 1996.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| BERNADINE SUITUM, | ) | |
| | ) | No. 94-15768 |
| Plaintiff-Appellant, | ) | |
| v. | ) | D.C. No. |
| | ) | CV-91-040-ECR |
| TAHOE REGIONAL | ) | |
| PLANNING AGENCY, | ) | **OPINION** |
| | ) | |
| Defendant-Appellee. | ) | |

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted
November 13, 1995--
San Francisco, California

Filed: April 1, 1996.

Before: Mary M. Schroeder and
Arthur L. Alarcon, Circuit Judges,
and Owen M. Panner,* District Court Judge

Opinion by Judge Panner

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

## SUMMARY

### Individual Rights/Constitutional Rights/Real Estate

The court of appeals affirm a district court judgment. The court held that a property owner's claim that an agency committed an unconstitutional taking when it refused to permit her to build a home on her residential lot was unripe, where the owner had not applied for a transfer of her development rights through an available program.

A 1987 plan (Plan), which was drafted pursuant to the 1980 Tahoe Regional Planning Compact, included an Individual Parcel Evaluation System (IPES), under which appellee the Tahoe Regional Agency (TRPA) assigned a numerical score to a residential lot depending on its relative environmental suitability for development. The TRPA annually established a numerical IPES level enabling owners of parcels with IPES scores above a certain level to seek building permits. The Plan also created Stream Environment Zones (SEZs) and allowed no new land coverage or other permanent land disturbance with SEZs, except for certain limited public uses. The Plan established criteria that a property owner had to meet before building a single-family residence.

The Transfer of Development Rights (TDR) program allowed for transfers of land coverage, residential development rights, and residential allocations. For property within a SEZ, the property owner could transfer one percent of the total property area. Subject to county approval and the receiving parcel's use and density eligibility, residential development rights could be transferred anywhere in the Lake Tahoe Basin. Property owners were allowed to transfer a residential allocation from a parcel with a low IPES score to any parcel that had an IPES score above the annual IPES level.



Appellant Bernadine Suitum owned property located in a SEZ in the Basin. Suitum had one residential development right and 183 square feet of land coverage available to transfer. She did not apply for another residential allocation or to transfer her residential development right or available land coverage under the TDR program. Suitum brought a civil rights action against the TRPA, alleging that it committed an unconstitutional taking and violated her substantive due process and equal protection rights when it refused to permit her to build a home on her residential lot. The district court granted summary judgment to the TRPA, concluding that Suitum's claims were unripe. Suitum appealed.

**[1]** The "final decision requirement" required Suitum to show that before filing suit, she sought a final decision from the TRPA in regard to the application of the regulation to the property. **[2]** Suitum had to apply for the transfer of her development rights through the TDR program before her claim would be ripe. **[3]** Without an application for the transfer of development rights, the TRPA was foreclosed from determining the extent of the use of her property. **[4]** Without pursuit of the transfer of development rights, it could not be known whether the regulations went too far; no one knew how far the regulations went. Without attempting to transfer the rights she possessed, Suitum could not know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations. **[5]** Within the unique TRPA regulatory scheme, transfer of development rights was a "use" of SEZ property.

**[6]** The district court did not abuse its discretion in excluding from ripeness analysis an affidavit from a former TRPA staff member familiar with TRPA ordinances and application procedures for transfer of development commodities. **[7]** The specific issue on which expert testimony was relevant was the value of Suitum's transfer of development rights. The former staff member was not an appraiser. **[8]**

Given that Suitum's development rights possessed significant value, she failed to meet her burden of showing that participation in the TDR program was futile.

**[9]** Compliance with the final decision process is required to establish a ripe claim, even where it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations.

## COUNSEL

William Patterson Cashill, Reno, Nevada, for the plaintiff-appellant.

J. Thomas Susich, Vicki E. Hartigan, Crowell, Susich, Owen & Tackes, Carson City, Nevada, for the defendant-appellee.

## OPINION

PANNER, District Judge:

In this 42 U.S.C. S 1983 action, Bernadine Suitum alleges that the Tahoe Regional Planning Agency (TRPA) committed an unconstitutional taking and violated her rights to substantive due process and equal protection when it refused to permit her to build a home on her residential lot in the Lake Tahoe Basin. The district court concluded that Suitum's claims were unripe and granted summary judgment to TRPA. We affirm.

## BACKGROUND

I. TRPA

TRPA was created in 1969 by the Tahoe Regional Planning Compact. Pub. L. 91-148, 83 Stat. 360; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1969 Compact); *amended*, Pub. L. 96-51, 94 Stat. 3233; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1980 Compact). We have previously detailed TRPA's background and it need not be repeated here. *See, e.g., People of Calif. v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1310-1312 (9th Cir.), *amended*, 775 F.2d 998 (9th Cir. 1985).

II. The 1987 Plan



The 1987 Plan, drafted pursuant to the 1980 Compact, governs development of Suitum's property and includes the Individual Parcel Evaluation System (IPES) under which TRPA assigns a numerical score to a residential lot depending on its relative environmental suitability for development. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1320 (D. Nev. 1992)(listing relevant environmental criteria). TRPA annually establishes a numerical IPES level enabling owners of parcels with IPES scores above the stated level to seek building permits. Owners of parcels with IPES scores below that level may proceed with development only if the level is lowered. *Id.*

The 1987 Plan also creates Stream Environment Zones (SEZs) which generally convey surface water from upland areas into Lake Tahoe and its tributaries. The 1987 Plan allows no new land coverage or other permanent land disturbance within SEZs, except for certain limited public uses.

Finally, the 1987 Plan establishes four criteria that the property owner must meet before building a single-family residence: (1) an IPES score above the numerical level established for development in that calendar year; (2) a residential development right; (3) adequate land coverage; and (4) a residential allocation.

III. Transfer of Development Rights

The Transfer of Development Rights (TDR) program is "an elaborate system of transfers of development rights[,]" *id.*, which allows for transfers of land coverage, residential development rights, and residential allocations. A property owner may transfer land coverage to a receiving parcel within the same hydrologic zone allowing for construction of a larger project on the receiving parcel. For property within a SEZ, the property owner is allowed to transfer one percent of the total property area. For example, Suitum's property is approximately 18,300 square feet. Because it is located in a

SEZ, she is allotted 183 square feet of land coverage to transfer to another parcel.

Subject to county approval and the use and density eligibility of the receiving parcel, residential development rights may be transferred anywhere in the Lake Tahoe Basin. Property owners may transfer a residential allocation from a parcel with a low IPES score to any parcel with an IPES score above the annual IPES level.

IV. Development of Suitum's Property Under the 1987 Plan

Suitum purchased the property in 1972 and first attempted development of the lot in 1989 when she obtained a residential allocation from Washoe County for the construction of a house. After a field verification, TRPA initially determined that the property was entirely located in a SEZ and then assigned it a zero IPES score. Suitum appealed. TRPA upheld the IPES score on the basis that the lot was located in a SEZ.

Suitum has one residential development right and 183 square feet of land coverage available to transfer. Although she obtained a residential allocation in 1989, she did not use it that year and it reverted back to the county. Suitum has not applied for another residential allocation. Suitum has not applied to transfer her residential development right or available land coverage under the TDR program.



## DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo. *Han v. Mobil Oil Corp.*, No. 94-55373, slip op. 15379, 15382, 1995 WL 728210 at *1 (9th Cir. Dec. 11, 1995). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Id.* at 15383. We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

II. General Taking Claim Standards

A regulatory taking in violation of the Fifth Amendment, such as that alleged by Suitum, occurs if the regulation "denies an owner economically viable use of his land." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 (9th Cir. 1994). "[T]he term 'economically viable use' has yet to be defined with much precision." *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993). However, "the existence of permissible uses generally determines whether a development restriction denies a property holder the economically viable use of its property." *Id.* The regulation's economic impact and the extent to which it interferes with investment-backed expectations are relevant to the inquiry. *Penn Cent. Transport Co. v. City of New York*, 438 U.S. 104, 124 (1978). In sum, "determining whether a regulatory action effects a taking requires complex factual assessments of the purposes and economic effects of government actions[.]" *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 924 (1994).

II. Ripeness Requirements for As-Applied Claims

A. Ripeness

[1] An "as applied" challenge is "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Carson Harbor*, 37 F.3d at 474. We have previously noted that there are "two independent hurdles to the filing of a [regulatory] taking claim in federal court against a state or local government." *Id.* (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). Only the first, known as the "final decision requirement," is at issue in this case and it requires Suitum to show that before filing suit, she sought a "final decision from [TRPA] regarding the application of the regulation to the property at issue." *Carson Harbor*, 37 F.3d at 474.[1]

We recently explained that finality "helps the court evaluate whether regulation of the subject property is excessive by identifying the extent of the regulation." *Dodd v. Hood River County*, 59 F.3d 852, 858 (9th Cir. 1995). The court cannot "determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)).

[2] We have not previously discussed the effect of a transfer of development rights on a regulatory taking claim. However, Judge Fletcher has made clear, in dicta, that she

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[1] These ripeness requirements are equally applicable to the due process and equal protection claims. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1231-32 (9th Cir.) (substantive due process), *cert. denied*, 115 S. Ct. 193 (1994); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56 (9th Cir.)(equal protection and substantive due process), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).



would require pursuit of transfer of development rights before a regulatory taking claim against TRPA could be considered ripe. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1344 n.3 (9th Cir. 1990)(Fletcher, J. concurring), *cert. denied*, 499 U.S. 943 (1991). As explained below, we agree with Judge Fletcher, and the district court, and conclude that Suitum must apply for the transfer of her development rights through the TDR program before her claim is ripe.

[3] Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property. *Dodd*, 59 F.3d at 858. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form[] of relief ... which might abate the alleged taking." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir.), *cert. denied*, 502 U.S. 498 (1990).

[4] Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. *MacDonald*, 477 U.S. at 348. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" *Kinzli*, 818 F.2d at 1453, and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis. *Youpee v. Babbitt*, 67 F.3d 194, 197 (9th Cir. 1995).

[5] Although in the more typical scenario a plaintiff may face a municipal planning board which reviews modified development plans or requests for variances, here, the TDR program effects the same purpose: facilitating alternative uses of the property. We recognize that TRPA's regulatory scheme is unique and conclude that within that scheme, transfer of development rights is a "use" of SEZ property. The key inquiry is whether the property retains "any

reasonable beneficial use[.]" *MacDonald*, 477 U.S. at 349. That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

B. Futility Exception

We recognize a "limited" futility exception to the ripeness doctrine. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990). Generally, the final decision requirement is excused if the plaintiff shows that it would be an "idle and futile act" or that the application procedures are unfair. *Kinzli*, 818 F.2d at 1454, 1455; *Del Monte Dunes*, 920 F.2d at 1496 (plaintiff's burden).

Suitum argues that her claims are ripe because the TDR program is a "ruse, a sham." She contends that the TDR program has produced no sales and that her property has no marketable development rights. In support of her argument, she relies on the affidavit of her expert, Paul Kaleta, a former TRPA staff member who is now a private consultant and who is familiar with TRPA ordinances and application procedures for transfer of development commodities.

In support of its contention that pursuit of transfer of development rights under the TDR program is meaningful, TRPA relies on the affidavit of Certified Appraiser Stephen R. Johnson who has twenty-four years of appraising experience in the Lake Tahoe area. He attests that Suitum's development rights have value.

1. Exclusion of Kaleta's Affidavit

[6] The district court concluded that there is significant value in the transfer of residential development rights and transfer of residential allocations. In reaching this conclusion, the district court disregarded Kaleta's affidavit and relied only on the valuation evidence submitted by TRPA. We conclude that the district court did not abuse its discretion in



excluding Kaleta's affidavit from the court's ripeness analysis.

We review "a district court's decision to admit or exclude expert testimony for an abuse of discretion." *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995). "Generally, a district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts." *Id.*

[7] Suitum contends that Kaleta's experience as a TRPA regulator qualifies him to testify as to the value of her development rights. To offer an expert opinion, Kaleta must possess the required knowledge, skill, experience, training, or education. Fed. R. Evid. 702. The specific issue on which expert testimony is relevant is the value of Suitum's transfer of development rights. It was not a clear error of judgment for the district court to conclude that a licensed appraiser or someone with demonstrated experience in *valuation* was the proper expert on this issue. Kaleta is not an appraiser either by experience, education, or other training. His experience in facilitating property owners in TDR program transfers is not equivalent to experience in assigning a market value to TRPA development rights. The district court's exclusion of Kaleta's affidavit was not an abuse of discretion.

[8] TRPA's evidence shows that without an allocation right, Suitum's development rights are valued from $10,000 to $21,500 or more. With an allocation right, the value increases by approximately $30,000. Given that Suitum's development rights possess some significant value, Suitum fails to meet her burden of showing that participation in the TDR program is futile. Thus, her application to the TDR program is required to present ripe taking, equal protection, and substantive due process claims to the court.

Finally, we reject Suitum's suggestion made at oral argument that because the TDR program is not designed to give her just compensation, she need not participate in it to demonstrate ripeness. In the regulatory taking analysis, a taking must be established before the question of just

compensation arises. The object of the final decision requirement is to determine whether a taking has occurred at all, independent of any compensation issue, by examining the extent of the regulations' economic impact and interference.

[9] Pursuit of a final decision in general, and application to the TDR program in particular, may mitigate the regulations' economic effect and result in a diminution in value rather than a more severe economic impact. The imposition of regulatory ordinances that merely diminish the value of property does not constitute a taking. *See, e.g., William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (diminution of property value from $2 million to $100,000 not a taking), *cert. denied*, 445 U.S. 928 (1980). Therefore, compliance with the final decision process is required to establish a ripe claim, even when it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations. Because Suitum failed to apply for transfers of development rights through the TDR program and fails to demonstrate that such an application would be futile, her claims are unripe for adjudication.

III. TRPA's Request for Attorney's Fees on Appeal

Pursuant to 42 U.S.C. § 1988, TRPA asks for attorneys' fees for defending this appeal. We may award attorneys' fees under section 1988 to the prevailing party for fees on appeal. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir. 1986), *amended* 808 F.2d 1373 (9th Cir. 1987). We reject TRPA's request for fees. Suitum's claim was not frivolous or groundless and fees are inappropriate under the circumstances. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (court may award section 1988 fees when the claim is "frivolous, unreasonable, or groundless").

AFFIRMED.



**APPENDIX B** Filed 5/13/96
**NOT FOR PUBLICATION**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| BERNADINE SUITUM, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | No. 94-15768 |
| v. | ) | D.C. No. CV-91-040-ECR |
| | ) | |
| TAHOE REGIONAL | ) | |
| PLANNING AGENCY, | ) | ORDER |
| | ) | |
| Defendant-Appellee. | ) | |

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

**APPENDIX C**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM,
Plaintiff,

CV-N-91-040-ECR

v.

ORDER

TAHOE REGIONAL
PLANNING AGENCY; and
STATE of NEVADA,
Defendants.

_____ /

This case involves a takings claim by plaintiff Suitum, the owner of a single-family residential lot in Incline Village, Washoe County, Nevada, classified as stream environment zone (SEZ), to recover damages because she is not allowed to build a residence on the property. Plaintiff has appealed the score of her lot under the Individual Parcel Evaluation System (IPES) but has not attempted to transfer development rights from the parcel at issue to another parcel under the transfer development plan created by Tahoe Regional Planning Agency (TRPA).

Defendants filed a motion for summary judgment (document #66) arguing, in part, that this Court has no jurisdiction over this action because plaintiff's claim is no ripe. Specifically at issue is the fact that plaintiff has failed to apply to TRPA to transfer development rights from her property. It is argued therefore, that plaintiff has not pursued the key avenue of relief for one owning SEZ land in the Lake Tahoe Basin.



This Court ordered that the parties submit supplemental briefs regarding the procedures, prerequisites, and value of the transfer of development rights as applicable in this case so that the Court could determine if the only avenue not yet pursued was a application for a meaningful use of the property (Order dated November 23, 1993 document #71). The parties submitted briefs and additional affidavits on the issue.[1] The briefing on this issue was completed on February 28, 1994 and the Court addresses the issue in this expedited order.

Ripeness of a claim governs the power of a federal court to act in a takings case. This Court does not have subject matter jurisdiction unless the claim is ripe. *Macdonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456-57 (9th Cir. 1987) *modified*, 830 F.2d 968 (9th Cir. 1987) *cert. denied*, 484 U.S. 1043 (1988).

An essential prerequisite to a regulatory takings claim is the final and authoritative determination of the type and

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[1] The affidavit of Paul Kaleta is inadequate under FRCP 56(e) and is disregarded by the Court. There is no showing that Mr. Kaleta is an expert. In order for opinions and conclusions to be transformed into evidence admissible at trial such opinions and conclusions must be offered by a qualified expert. A witness may be qualified as an expert by knowledge skill, experience, training or education...: FRE 702. While Mr. Kaleta's affidavit is full of opinions and conclusions as to the value of Plaintiff's development rights, he is not neither licensed nor certified as a real estate appraiser in the State of Nevada nor has he recited any knowledge, skill, experience, training or education which would qualify him to testify as an expert as to the valuation of development rights with which this Court is concerned.

intensity of use legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. *Macdonald, Sommer & Frates v. Yolo County*, at 348.

As things now stand, there is no final decision as to how plaintiff will be allowed to use her property. *See Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-191 (1985). The Court is convinced that the transfer rights are significant to the takings calculus. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978); *American Savings & Loan v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (recognizing that transferable development rights mitigate financial burdens of zoning regulations and must be considered when considering the economic impact of a regulation). The briefing and affidavits presented to the Court on the issue illustrates that the transfer of development rights program created by TRPA is specifically designed to give relief to owners of SEZ properties. The finality, in terms of allowed use of the property, may only be determined after plaintiff applies to transfer her development rights. The specific examples of sales of rights in the past demonstrates there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to. In fact, an application for transfer is the only "meaningful application" that can be made once property is determined to be SEZ. *See Kinzli* 818 F.2d at 1454-1455. In addition, there may be significant residual value as an adjunct to the transfer remedies.

The determination that the application for transfer rights is necessary before the takings claim in the case at hand can be considered ripe also comports with the other cases holding that pursuit of transfer rights is among the list of things that must be pursued in order for a takings claim to be ripe. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 &n.6 (D.Nev. 1986) *vacated in part on other grounds*, 911 F.2d 1331 (9th Cir.



1990), *cert. denied* 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied*, 111 S.Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992).

Absent an application to transfer development, and a final decision on such application, we cannot know whether plaintiff's land indeed is unusable. Without a decision as to the transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with plaintiff's reasonable investment-backed expectation, cannot be assessed. *Id.* Suitum's takings, substantive due process and equal protection claims are not ripe for consideration by this court. Plaintiff may not take her claims to trial without applying to transfer her development rights. TRPA's endeavor to do equity to SEZ holders would be rendered utterly meaningless. Moreover, until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations.

Plaintiff's claims are not ripe and this Court does not have jurisdiction over this action.

IT IS THEREFORE HEREBY ORDERED that TRPA's Motion for Summary Judgment (document #66) is GRANTED on all claims. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that Plaintiff's Cross Motion for Summary Judgment (document #68) is MOOT.

IT IS FURTHER ORDERED that Defendant's Motion for Protective Order Striking Supplement to Answers

to Interrogatories and for Expenses (document #78) is DENIED. The affidavit of Paul Kaleta and the Court's reliance thereon is addressed in this order at N.1.

DATED: March 30th 1994.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE



**APPENDIX D**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM, CV-N-91-040-ECR

Plaintiff,
v.

ORDER

TAHOE REGIONAL
PLANNING AGENCY; and
STATE of NEVADA,
Defendants.
_____ /

Plaintiff Bernadine Suitum alleges that the regulations adopted and implemented by the Tahoe Regional Planning Agency (TRPA) have resulted in a taking of her single-family residential lot in Incline Village without just compensation and due process of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In addition, plaintiff alleges that TRPA's action in this matter constitutes a violation of substantive due process and a denial of equal protection in violation of the Fifth and Fourteenth Amendments. Plaintiff also seeks reimbursements for property taxes and special assessments made on the property. Defendant has moved for summary judgment on all claims (document #69).

Plaintiff has owned the lot at issue since 1972 and became interested in building a single-family home on her lot and obtained a residential allocation for the construction of a house on her lot from Washoe County in 1989. Plaintiff's property is located on what is known as a "Stream

Environment Zone" (SEZ).[1] Such zones are subject to a non-degradation (and restoration) standard due to the integral function they serve in the cleansing of runoff and the achievement of regional water quality goals and standards.[2] The relevant regulation affecting plaintiff's ability to build is TRPA's 1987 Regional Plan. The plan allows no new land coverage or other permanent land disturbance within stream zones, with very limited exceptions such as for public outdoor recreation facilities and certain public service facilities.

The Individual Parcel Evaluation System (IPES) excludes SEZ's from evaluation or alternatively mandates a score of zero (i.e. a prohibition of new land coverage.)[3] However, under the 1987 Plan, owners of property with a residential development right may transfer such right to another parcel. Plaintiff has not applied to TRPA to transfer from her parcel to another parcel either a residential dwelling unit, land coverage or a development allocation. Defendants claim that the fact that plaintiff has not applied for such a transfer of development rights precludes her from alleging a takings claim at this juncture for lack of ripeness.

With regard to the claim for reimbursement of fees, taxes and assessments (Fifth Claim for Relief) Plaintiff

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[1] Plaintiff does not argue this categorization.

[2] The parties and Court are well aware of the history, purposes and functions of the TRPA and the interstate compact; it is therefore unnecessary to chronicle these subjects in this order. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1319-1320 (D.Nev. 1992).

[3] It is uncontested that Plaintiff appealed her parcel evaluation (a score of zero) which prohibited her from building on her lot.



acknowledges that TRPA is not the correct defendant for this claim and the action is dismissed. However, with regard to the remaining claims the threshold issue of ripeness must be decided before proceeding further. The Court is unable to make such a determination of ripeness with the information before it. The only issue in this case is whether or not plaintiff must pursue her development transfer rights in order to present a ripe claim to this Court. The briefings by the parties do not make clear what these rights are or the procedures for obtaining such rights.

The Court understands that plaintiff may not develop or build on the parcel of land she owns and that no developmental rights may be transferred *to* the property at issue. While Defendants correctly assert that the courts have previously listed the application for transfer of development rights as a prerequisite to stating a ripe takings claim, such a prerequisite has always been listed among other avenues that had not yet been pursued by plaintiffs or in our dicta. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 & n.6 (D.Nev. 1986), *vacated in part on other grounds*, 911 F. 2d 1331 (9th Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied* ___ U.S. ___, 111 S. Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992); *Tahoe Sierra Preservation Coun. v. Planning Agency*, 808 F. Supp. 1474, 1483 (D.Nev. 1992) *appeal pending* Ninth Circuit Docket No. 93-15113.

In this case the Court is concerned because the transfer of rights is the *only* avenue not yet pursued, the plaintiff cannot transfer any rights *to* the property at issue, and there is no evidence of any property appropriate for such transfer. There is also a question as to exactly what rights may be transferred in this case and what benefit or value

there is to a transfer. The only development right known to this Court is the allocation right granted by Washoe County.

Defendants claim that an application for transfer is the only "meaningful application" that can be made in this case. This Court would like the "meaningfulness" of this application explained. The question of whether or not a transfer of development rights constitutes a "use" of property can then be determined. An explanation as to how plaintiff can pursue the right to transfer development and how that is meaningful to the use of the property at issue is necessary. The dicta of the numerous cases aside, the Court requests that the parties address this issue specifically in briefs explaining what development rights can be transferred in plaintiff's case and the procedures, prerequisites and value of such transfer as applicable in this case.

IT IS THEREFORE HEREBY ORDERED that the parties shall file concurrent briefs on the issue of the transfer of development rights as applicable in this case (and described in the paragraph above) by December 8, 1993. Concurrent replies shall be filed no later than December 22, 1993.

DATED: November 23, 1993.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE



**EXHIBIT E**

**EXCERPTS FROM "REGIONAL PLAN FOR THE LAKE TAHOE BASIN, GOALS AND POLICIES, TAHOE REGIONAL PLANNING AGENCY, SEPTEMBER 17, 1986"**

STREAM ENVIRONMENT ZONE

Stream environment zones (SEZs) and related hydrologic zones consist of the natural marsh and meadowlands, watercourses and drainageways, and floodplains which provide surface water conveyance from upland areas into Lake Tahoe and its tributaries. Stream environment zones are determined by the presence of riparian vegetation, alluvial soil, minimum buffer strips, water influence areas, and floodplains.

GOAL #1 PROVIDE FOR THE LONG-TERM PRESERVATION AND RESTORATION OF STREAM ENVIRONMENT ZONES.

The preservation of SEZs is a means for achieving numerous environmental thresholds. Policies that promote their maintenance, protection, and restoration are listed below.

POLICIES

5. NO NEW LAND COVERAGE OR OTHER PERMANENT LAND DISTURBANCE SHALL BE PERMITTED IN STREAM ENVIRONMENT ZONES EXCEPT FOR THOSE USES AS NOTED IN A, B, C, D, AND E BELOW:

   A. PUBLIC OUTDOOR RECREATION FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS A NECESSARY PART OF A PUBLIC AGENCY'S LONG RANGE PLANS FOR

PUBLIC OUTDOOR RECREATION; (3) THE PROJECT, BY ITS VERY NATURE, MUST BE SITED IN A STREAM ENVIRONMENT ZONE; (4) THERE IS NO FEASIBLE ALTERNATIVE WHICH WOULD REDUCE THE EXTENT OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES.

B. PUBLIC SERVICE FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS NECESSARY FOR PUBLIC HEALTH, SAFETY, OR ENVIRONMENTAL PROTECTION; (2) THERE IS NO REASONABLE ALTERNATIVE, INCLUDING SPANS, WHICH AVOIDS OR REDUCES THE EXTENT OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES;

C. PROJECTS WHICH REQUIRE ACCESS ACROSS STREAM ENVIRONMENT ZONES TO OTHERWISE BUILDABLE SITES ARE PERMISSIBLE IN SEZs IF: (1) THERE IS NO REASONABLE ALTERNATIVE, WHICH AVOIDS OR REDUCES THE EXTENT OF ENCROACHMENT IN THE SEZ.

D. NEW DEVELOPMENT MAY BE PERMITTED IN MAN-MODIFIED STREAM ENVIRONMENT ZONES

E. STREAM ENVIRONMENT ZONE RESTORATION PROJECTS AND EROSION CONTROL PROJECTS.



# APPENDIX F

## EXCERPTS FROM "REGIONAL PLAN--CODE OF ORDINANCE"

20.3.A Base Land Coverage Requirements: The allowable base land coverage ("base coverage") shall be determined by using the coefficients set forth in the report entitled, Land Capability Classifications of the Lake Tahoe Basin, Bailey, R.G. 1974. These coefficients are:

| Lands Located In Land Capability District* | Base Coverage |
|---|---|
| 1a, 1b, 1c | 1% |
| 2 | 1% |
| 3 | 5% |
| 4 | 20% |
| 5 | 25% |
| 6, 7 | 30% |

*Lands located in Geomorphic Group I are classified land capability district 1 and are permitted one percent coverage.

...

20.3.C Manner Of Transferring Land Coverage: Land coverage transferred to eligible parcels for eligible uses prescribed by Subsection 20.3.B, shall be transferred in the manner set forth in this Subsection. A transfer of land coverage may be from one parcel to another and may occur in connection with TRPA's approval of: a project; a community plan; redevelopment plan; a specific or master plan; or a transfer of coverage program for a subdivision. Transfers shall be recorded in accordance with Chapter 38, shall not result in land coverage on eligible parcels in excess of

the maximum amounts prescribed by Subsection 20.3.B, and shall be in accordance with the provisions of this chapter. Transfers may be undertaken in connection with Chapter 34. Removal of existing land coverage without transfer in connection with a project, in the manner and as otherwise required by this chapter, may be accomplished, by crediting the coverage account of the pertinent parcel pursuant to Chapter 38. Land coverage banks may be designated by TRPA pursuant to Chapter 38, which banks may provide a supply of land coverage to accommodate individuals needing coverage for transfer purposes.

...

(2) Types Of Land Coverage Eligible For Transfer: The following types or classes of legally established land coverage are eligible for transfer to receiving parcels in accordance with the provisions of this Chapter:

...

(c) Base Coverage: Unused allowable base land coverage referred to in Subsection 20.3.A may be transferred in all cases, except for transfers relating to commercial uses or facilities. Land coverage transferred as mitigation for excess coverage associated with commercial and tourist accommodation projects shall be existing hard coverage except as provided in Subparagraph 20.3.C(6).

...

(3) Sending Parcels Classified As Sensitive Lands (Lands Capability Districts 1-3):



If land coverage is transferred from a sending parcel that is located, in whole or in part, in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired in the manner set forth in Subparagraph 20.3.C(7) and may not be returned to the sending parcel.

...

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provisions for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii)

shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.

...

20.4 Prohibition Of Additional Land Coverage In Land Capability Districts 1a, 1c, 2 And 3 And 1b (Stream Environment Zones): No additional land coverage or other permanent land disturbance shall be permitted in Land Capability Districts 1a, 1c, 2, and 3 and Land Capability District 1b (stream environment zones) except as follows:

...

20.4.B Exceptions For Land Capability District 1b (Stream Environment Zone): The following exceptions apply to the prohibition of land coverage and disturbance in land capability district 1b (stream environment zone):

(1) Stream Crossings: Land coverage and disturbance for projects to effect access across steam environment zones to otherwise buildable sites, if such projects otherwise comply with applicable development standards in Chapter 27, may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone, or that encroachment is necessary to reach the building site recommended by IPES; and



(b) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(2) Public Outdoor Recreation: Land coverage and disturbance for public outdoor recreation facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is a necessary part of a public agency's long range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature must be sited in a stream environment zone, such as bridges, stream crossings, ski run crossings, fishing trails, and boat launching facilities; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3 or SEZs), Water Quality management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which would avoid or reduce the extent of encroachment in the stream environment zone; and

(e) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(3) Public Service: Land coverage and disturbance for public service facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including a bridge span or relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall



include coverage and disturbance within the permitted Bailey coefficients.

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability District 1b (stream environment zones) for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar programs and facilities if TRPA finds that:

(a) The project, program, or facility is necessary for environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

...

34.2 Transfer Of Residential Development Right: A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;

34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or

community plan where residential uses are permissible and shall meet the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance



districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transferred.

...

34.5 Restriction Or Retirement Of Parcels: Restriction or retirement of parcels, of portions of parcels, for the purposes set forth in this Code, shall comply with the following requirements:

34.5.A Land Coverage: Parcels from which land coverage has been transferred are subject to provisions of Chapter 20.

34.5.B Allocation Transfer: Parcels from which allocations have been transferred shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

...

34.5.H Development Rights Transfer On Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZ, from which all residential development rights have been transferred, shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

...



35.2.C Determination Of The Number Of Bonus Units: Applications for projects proposing the use of residential bonus units shall include a list and description of all mitigation measures identified in Subsection 35.2.D that are proposed as part of the project. Based on review of the list and description of the mitigation measures proposed, TRPA shall determine a score for the project in accordance with Subsection 35.2.D. One residential bonus unit may be approved for each ten points received by a project.

35.2.D Mitigation Measures: Projects proposing the use of multi-residential bonus units shall receive a score only when one or more of the following mitigation measures are proposed as part of the project.

...

(4) Retirement, in accordance with Chapter 34, of an undeveloped parcel located in Land Capability Districts 1a, 1b (SEZ), 1c, 2, or 3:

...

(b) If the parcel is in Land Capability District 1b or in a stream environment zone - 30 points per transferred unit.

# APPENDIX G

## TAHOE REGIONAL PLANNING AGENCY

P.O. Box 1038
195 U.S. Highway 50 Zephyr Cove, Nevada (702) 588-4547
Round Hill, Zephyr Cove, NV 89448-1038 Fax (702) 588-4527

Type of Transfer (Check Applicable Box)

__ Land Coverage Transfer
__ Existing Development Transfer (improved parcel)
__ Development Right Transfer (unimproved parcel)
__ Allocation Transfer

TRANSFER DESCRIPTION:

FROM (sending parcel): _____ To (receiving parcel) _____
(APN) (APN)

(If more than one receiving parcel list in comment section.)

OWNER(S) OF RECORD (sending parcel):

Name(s): _____ Phone: _____

Mailing Address: _____ City: _____ State: ___ Zip: _____

OWNER(S) OF RECORD (receiving parcel):

Name(s): _____ Phone: _____

Mailing Address: _____ City: _____ State: ___ Zip: _____

PERSON AUTHORIZED TO REPRESENT THE TRANSFER AND TO WHOM ALL CORRESPONDENCE IS TO BE SENT:

Name(s): _____ Phone: _____

Mailing Address: _____ City: _____ State: ___ Zip: _____

LOCATION OF PROPERTY: (Stake property corners of sending and receiving parcels and provide location maps as necessary)

SENDING PARCEL:

County: _____ Subdivision: _____ Lot#: _____

Street: _____ Adjacent parcel Addresses: _____

RECEIVING PARCEL:

County: _____ Subdivision: _____ Lot#: _____

Street: _____ Adjacent parcel Addresses: _____





PROPERTY RESTRICTIONS (List any deed restrictions, easements or other restrictions on property):

Sending Parcel: _____

_____

Receiving Parcel: _____

_____

PRIOR APPROVALS: (List any prior local or CTRPA/TRPA approvals/permits received for the subject property):

Sending Parcel:

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Receiving Parcel:

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Agency: _____ Permit Type: _____ Date: _____ Permit # _____

Is the sending parcel free of nuisance and hazard (i.e., foundations, excavations, spoil piles)? _____ If no, please describe in comment section.

Does the receiving parcel meet the basic service requirements of Chapter 27 of the TRPA Code of Ordinances including but not limited to: 1) served by paved roadway; 2) adequate water rights and water supply system; 3) sewer service; and 4) electrical service? _____ If no, please describe in comment section.

Existing Land Coverage:

Sending Parcel _____ Square Feet of Hard Coverage

Sending Parcel _____ Square Feet of Soft Coverage (dirt roads, paths, and parking)

Existing and Proposed Uses of Property:

Sending Parcel _____

_____

Receiving Parcel _____

_____

Amount of Land coverage to be transferred (if applicable): _____

Comments: _____

_____

_____

I hereby declare under penalty of perjury that this application and all information submitted as part of this application, are true, complete, and accurate to the best of my knowledge. Should any information or representation submitted in connection with this application be incorrect or untrue, I understand that TRPA may rescind any approval, or take other appropriate action.

Signed _____ At _____ Dated _____
(Property owner(s)) (County)

AUTHORIZATION FOR REPRESENTATION:

The following person(s) is owner of the subject property (APN _____)
or of a sufficient interest therein to make this application:

(Print Owners(s) name(s) _____

_____

If the applicant is not the sole owner of the property, list the names and addresses of the owners and the legal relationship of the applicant to the owner(s) that entitles the applicant to make this application.

_____

_____

As such he/she/they authorize _____ to act as his/her/their representative in connection with this application for the subject property and agree to be bound by said representative. Any cancellation of this authorization shall not be effective until receipt of written notification of same by TRPA. I understand that if this project is approved that I, as the permittee, will be held responsible for any and all permit conditions.

REQUIREMENTS FOR COMPLETE APPLICATION: _____
Owner's Signature Date

____ 1. Completed Application Form

____ 2. Application Fee

____ 3. Site Plan (if transferring existing coverage)

---

FOR OFFICE USE ONLY

Date Received: _____ By: _____

Complete Application: _____ By: _____
$240
Filing Fee: ___: _____ Receipt #: _____

Supreme Court, U.S.
FILED
SEP 13 1996
CLERK

No. 96-243

In The

# Supreme Court of the United States

October Term, 1995

BERNADINE SUITUM,

*Petitioner,*

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

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26 pp

## QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider a Fifth Amendment takings decision where the petition is based upon issues which were not raised in the trial court or appellate court below and therefore not addressed by those courts?

2. Should this Court grant certiorari to consider a petition which does not raise nationally important questions of federal law in light of the uniqueness of TRPA's regulatory scheme as specifically recognized by the Ninth Circuit Court of Appeals in its decision below?

3. Can the trial court make a determination as to whether a taking has occurred where the plaintiff has failed to pursue all economically viable uses of her property?

4. Should this Court grant certiorari to consider a decision of the Ninth Circuit Court of Appeals which does not conflict with any relevant decision of this Court, nor of any decision of any other Circuit Court of Appeals?

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## BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

The Tahoe Regional Planning Agency [TRPA], Respondent, respectfully submits this brief in opposition to the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals, dated August, 1996, filed herein by Petitioner Bernadine Suitum [Mrs. Suitum], which petition was received by Respondent on August 14, 1996.

## I

## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

Petitioner, Mrs. Suitum, seeks to overturn the decision of the Ninth Circuit Court of Appeals affirming the Order of the United States District Court for the District of Nevada granting summary judgment in favor of Respondent, TRPA. The District Court found that Mrs. Suitum's takings, equal protection and substantive due process claims were not ripe because of her failure to attempt to transfer her development rights as provided for in TRPA's regulations.[1]

### B. MRS. SUITUM'S PROPERTY

Mrs. Suitum is the owner of a single family residential lot in Incline Village, Washoe County, Nevada, which lies within the Tahoe Basin and is regulated by TRPA.

---

[1] The term "development rights" includes a residential development right, bonus residential development rights, a residential allocation and land coverage.

Mrs. Suitum acquired her property in 1972. Court Record [CR] 1 – Complaint at 2:13-17. Mrs. Suitum's property is classified by TRPA as being located within a Stream Environment Zone [SEZ], which is a classification established by TRPA based upon the environmental sensitivity of the parcel. An SEZ generally conveys surface water from upland areas into Lake Tahoe and its tributaries. Appendix A to Petition, at 5. The role of an SEZ in the cleansing of run-off is integral to the preservation of Lake Tahoe's water clarity. CR 66 – Scholley Aff., Ex. "A" p. 75. Lake Tahoe is universally acclaimed as a national treasure. *See Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 at 393-394, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979); *Kelly v. TRPA*, 109 Nev. 638 at 649, 855 P.2d 1027 (1993), *cert. denied*, 510 U.S. 1041, 114 S.Ct. 684 (1993). The riparian vegetation of an SEZ is important for many reasons, including treatment of runoff and maintenance of soil stability. CR 66 – Scholley Aff., Ex. "A" p. 76.

The classification of Mrs. Suitum's parcel as an SEZ prohibits construction of a new single family dwelling thereon. There are, however, other economic uses of Mrs. Suitum's property. These include the transfer of development rights as provided under TRPA's 1987 Regional Plan. Apparently it is Mrs. Suitum's position, as first revealed in her Petition for Writ of Certiorari, that restrictions which prevent desired construction upon property constitute a "taking" under the Fifth Amendment to the United States Constitution regardless of other uses available to the owner.



## C. BACKGROUND OF TRPA

TRPA is a bi-state entity created by an interstate compact in 1969 between the States of California and Nevada. Pub. L. 91-148, 83 Stat. 360; Cal. Gov. Code §66801; NRS §277.200 [1969 Compact]. The 1969 Compact declared Lake Tahoe's waters threatened with deterioration, necessitating the creation of TRPA to adopt and enforce a regional plan of resource conservation and orderly development. 1969 Compact, Art. I.

Due to the failure of the 1969 Compact to cope with the persistent decline in the quality of the lake and its environs, the states, with Congress' approval, extensively amended the document in December of 1980. Pub.L. 96-551, 94 Stat. 3233; Cal. Gov. Code §66801; NRS §277.200 [1980 Compact]. In a tone far more urgent than its predecessor, the 1980 Compact accentuated the mounting threats to the ecology of the region and declared the need to establish environmental threshold carrying capacities and adopt a plan achieving them while providing for orderly growth. 1980 Compact, Art. I(a).

The regulations of which Mrs. Suitum complains are contained in the 1987 Regional Plan [1987 Plan] adopted by TRPA pursuant to the mandate of the 1980 Compact.[2] The keystone of the 1987 Plan, in terms of residential development, is the Individual Parcel Evaluation System

---

[2] Earlier TRPA regulations, such as Ordinance No. 81-5, the eight month moratorium following it and TRPA's 1984 Regional Plan are not discussed in the Statement of the Case since they are not relevant to the issues before this Court. A description of the history of TRPA and the evolution of its regulations is set forth in *Kelly v. TRPA, supra*, 109 Nev. at 642-645.

[IPES], a scientifically based system for gradual development of all unbuilt residential lots in the Lake Tahoe Basin, excluding those located in an SEZ. *See generally* CR 66 – Scholley Aff., Ex. B, pp. VII:3-8. The 1987 Plan emphasizes the importance of SEZs and the essential factor which they play in achieving environmental thresholds for water quality, vegetation preservation and soil conservation. *Id.* at p. IV-23. Consequently, the 1987 Plan generally prohibits new residential land coverage on an SEZ.

Once TRPA has determined that a landowner's property is within an SEZ the landowner's first step is to appeal that determination to TRPA's Governing Board. Mrs. Suitum did appeal the parcel's designation as an SEZ under IPES, which appeal was unsuccessful. CR 1, p. 3:14-16. The next step a landowner must take under the 1987 Plan is to make an application to transfer, or at least make reasonable efforts to transfer, the development rights associated with her property. A fairly accurate description of these rights, although somewhat simplified, is set out in the Petition for Writ of Certiorari at pages 6 and 7. It is this step which Mrs. Suitum has not taken. CR 66, Exhibit B at 119:21-28; 120:1-14. Nonetheless, until Mrs. Suitum at least makes a reasonable effort to transfer her development rights, the trial court is unable to determine how TRPA's regulations apply to the property in question, or whether the property has been deprived of all of its economically beneficial or productive use.

This action concerns the application of TRPA's 1987 regulations to Mrs. Suitum's property. Mrs. Suitum has not contested that TRPA's regulations are rationally



related to a legitimate governmental interest. In fact, the Nevada Supreme Court after extensively reviewing the 1987 regulations specifically held that TRPA's regulations are rationally related to a legitimate governmental interest. *Kelly v. TRPA, supra,* at 649.

## D. THE DECISIONS BELOW

Mrs. Suitum initiated an action in the United States District Court for the District of Nevada [the District Court] on January 28, 1991, alleging various constitutional deprivations, including allegations that TRPA had "taken" her property without just compensation and that she was entitled to civil damages under 42 U.S.C. section 1983. *See generally* CR 1. During the ensuing two years, the District Court dismissed various causes of action and released the other two defendants from the action. After extensive discovery TRPA filed a Motion for Summary Judgment based upon *inter alia* the following grounds:

1. Mrs. Suitum's takings, substantive due process and equal protection claims for relief were not ripe for adjudication due to her failure to participate in the TDR program under the 1987 Regional Plan.

2. Mrs. Suitum had no claim on the merits for a violation of substantive due process or equal protection because TRPA's regulations, as a matter of law, are rationally related to the legitimate state interest of protecting Lake Tahoe.

3. Mrs. Suitum has no independent claim under the Civil Rights Act, 42 U.S.C. section 1983, because that statute is remedial only and depends upon Mrs. Suitum's

ability to state and prove an independent substantive constitutional violation.

Mrs. Suitum responded to the motion by arguing that:

1. She did not have sufficient time to market her development rights prior to filing suit because the statute of limitations would have barred the action.

2. She is not required to exhaust every administrative remedy.[3]

3. Even if TRPA's regulations are reasonably related to a legitimate state interest, she is entitled to compensation for the "taking" of her property.

After reviewing the issues, the District Court entered its order on November 23, 1993, directing that additional briefing was necessary concerning the transferable development rights [TDR] program under TRPA's 1987 Plan. As ordered by the court additional briefing was filed. Mrs. Suitum argued that the development rights under TRPA's 1987 Plan had no value and that the TDR program was a sham. Mrs. Suitum therefore argued that marketing these rights was futile and not required to establish ripeness under *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.), *amended*, 830 F.2d 968 (1987). In support of her claim Mrs. Suitum filed the affidavit of a former employee of TRPA, Paul Kaleta. TRPA responded to Mrs. Suitum's claim of futility by submitting affidavits demonstrating

---

[3] By arguing that Mrs. Suitum need not exhaust every administrative remedy, her counsel apparently confused the doctrine of ripeness with that of exhaustion of administrative remedies.



that development rights under TRPA's plan have marketable value, and that Mrs. Suitum's alleged expert was not qualified to state opinions regarding the value of the development rights. The District Court agreed with TRPA and rejected Kaleta's affidavit. The trial court concluded that Mrs. Suitum's takings, substantive due process and equal protection claims were not ripe for adjudication. The court held that because Mrs. Suitum had failed to pursue transfer of her development rights there was an insufficient basis upon which the trial court could determine how TRPA's regulations apply to her property and whether the regulations go so far as to effect a taking.

Mrs. Suitum appealed the District Court's decision to the Ninth Circuit Court of Appeals. Mrs. Suitum once again argued that her claims in the District Court were ripe because the TDR program is futile. She also argued that since she had filed an affidavit stating that the development rights lack value, a genuine issue of fact exists which should prevent the entry of summary judgment. The Ninth Circuit upheld the lower court's decision to disregard the Kaleta affidavit. It went on to affirm the lower court. The Ninth Circuit recognized the uniqueness of TRPA's regulatory system and concluded that transfers of development rights is a use of SEZ property within that scheme. Appendix A at 9.

Until Mrs. Suitum uses the property in the manner permitted by the regulations the trial court is unable to make a determination as to whether a "taking" has occurred.

## II

## REASONS FOR DENYING THE PETITION

### A. SUMMARY

The Petition for Writ of Certiorari should be denied. The issues raised are not nationally significant; nor are they likely to recur. Moreover, these issues are raised for the first time to this Court, and were not addressed by the courts below. Finally, the decision of the Ninth Circuit is consistent with this Court's prior decisions as well as those of the other Circuits.

### B. THE ISSUES PRESENTED IN THE PETITION WERE NOT RAISED IN THE LOWER COURTS.

The petitioner in this matter has alleged that TRPA's unique regulatory scheme has amounted to a taking of her property. As a component of this argument petitioner maintains that TRPA has denied all use of her property by prohibiting her from building a house on her land and that the sale of development rights is irrelevant. Nowhere below did the petitioner argue that restrictions prohibiting construction on land amount to a taking per se as now argued in the petition. While Mrs. Suitam did argue that her development rights had no value, she never asserted the proposition that the only use of property was the ability to construct a residence on it.

Likewise petitioner never maintained, prior to the filing of this petition, that "The Final Decision Ripeness Doctrine is Satisfied When the Economic Impact of the



Regulation on the Subject Property is Established – Regardless of Whether an Actual Market Transaction has Occurred." Instead petitioner has consistently maintained that her development rights have no value, or in the alternative that a genuine issue of fact exists as to their value.

The District Court and the Ninth Circuit were therefore deprived of the right to address the issues now raised by petitioner for the first time. In other words Mrs. Suitum has embarked on a new and uncharted strategy through the filing of the instant petition. The problem with Mrs. Suitum's tactics is that the lower courts were not given a fair opportunity to weigh the merits of that strategy. This Court has held that issues raised for the first time through a petition for writ of certiorari will ordinarily not be considered by this Court. *Youakim v. Miller*, 425 U.S. 231 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). The Petition for Writ of Certiorari should therefore be denied on the basis that petitioner failed to raise the issues presented therein in the courts below.

### C. THE ISSUES PRESENTED IN THIS PETITION ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW.

Petitioner has alleged that the issues argued in her petition are important questions of federal law and therefore should be reviewed by this Court. While the issues presented in her petition are of obvious importance to the litigants, they do not rise to the level of nationally important federal questions. This Court has long recognized

that utilization of transferable development rights is a use of property which may negate a takings claim. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 at 137 (1987).

TRPA's 1987 Plan sets forth an unique program specifically designed for the regulation of development within the Tahoe Basin. The 1987 Plan also includes an "elaborate system of transfers of development rights which allows for transfers of land coverage, residential development rights, and residential allocations." Appendix A at 5. As such it is unlike any other program in the country.

The Ninth Circuit recognized the unique nature of TRPA's regulations by stating as follows:

> We recognize that TRPA's regulatory scheme is *unique* and conclude that within that scheme, transfer of development rights is a use of SEZ property.
>
> [Emphasis Supplied] Appendix A at 9.

Given the unique nature of TRPA's regulatory system and its application solely to the Tahoe Basin, this Court should deny certiorari since no questions of nationally important federal law, as contemplated by Supreme Court Rule 10(a), have been raised.

## D. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT.

As a basis for her Petition, Mrs. Suitum asserts that the decision of the Ninth Circuit conflicts with prior relevant decisions of this Court. Petitioner's assertion is



incorrect since the Ninth Circuit's decision is consistent with this Court's prior rulings. TRPA will address each of the cited decisions in turn.

1. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Petitioner argues that the decision of the Ninth Circuit finding that development rights constitute a use of her property violates this Court's holding in *Williamson, supra*. The thrust of Petitioner's argument is that *Williamson* requires only that a final decision concerning permitted construction on the property be made in order for the case to be ripe. In other words, even if Mrs. Suitum's property has substantial economic uses it is still "taken" if regulations prohibit Mrs. Suitum from building a house on it. *Williamson*, however, does not support Mrs. Suitum's assertions. Nowhere in *Williamson* does this Court state that the only use of property is physical construction on said property. Rather, this Court continually refers to a method of deriving economic benefit from the property as opposed to a means of utilizing the property by placing a structure on it. Indeed, the Court in *Williamson* referred to the finding in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), that:

> the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive *economic* benefit from the property.
>
> [Emphasis Supplied] *Williamson, supra*, at 187

Additionally, *Williamson* cites *Penn Central* for the rule that "this Court consistently has indicated that

among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment backed expectations." *Williamson* at 191. Once again, no reference is made to physical development being required, rather the emphasis is on the economic uses that the property retains.

The *Williamson* Court further stated that:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations.
>
> *Id.* at 200.

Once again, the emphasis is upon the "value" of the property and "investment-backed profit expectations". Noticeably absent is the requirement for physical construction, as argued by Petitioner.

In *Williamson* this Court therefore held that "until the Commission determined that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent 'will be unable to derive



economic benefit' from the land." *Id.* at 191. Likewise, in the case at bar, until Mrs. Suitum reasonably pursues transfer of her development rights, it is impossible for the trial court to determine whether Mrs. Suitum "will be unable to derive economic benefit from the land."

2. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

As with *Williamson* the petitioner has misstated this Court's holding in *MacDonald* regarding what constitutes a "taking" of property. Once again this Court, in *MacDonald*, clearly held that the economic impact of the regulations, rather than the limitation of actual construction on the property is central to a takings analysis. This Court stated:

> Our cases have accordingly "examined the taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action – that have particular significance."
>
> *MacDonald*, 477 U.S. at 349, Citing *Kaiser Aetna v. United States*, 444 U.S. at 175, 100 S.Ct., at 390.

Similarly this Court cited with approval the holding in *Williamson*, wherein this Court stated that the proper inquiry regarding a taking is the effect the regulation has on the value of respondent's property and "investment backed profit expectation." *MacDonald*, 477 U.S. at 349. Nowhere does this Court state that permission to physically construct a building on the site is necessary to avoid a taking.

Indeed, this Court pointed out that in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the existence of a "development right" which could be transferred negated the finding of a taking in that case. *MacDonald*, 477 U.S. at 352. In the instant case evidence was presented to the District Court by TRPA that the development rights available for transfer by Mrs. Suitum have market value thereby negating her claim of futility. Since the property can be used by Mrs. Suitum to receive economic benefit, there can be no determination as to whether a taking has occurred until she makes reasonable efforts to transfer her development rights.

3. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

Finally, petitioner claims that the Ninth Circuit's decision nullifies the categorical taking doctrine in *Lucas*.

This Court in *Lucas* held that when property is deprived of "all economically beneficial or productive use" a categorical taking occurs for which compensation must be paid, unless the regulatory agency can show that the restrictions placed on the land are consistent with common law nuisance abatement. Thus, in order to determine whether a categorical taking has occurred the trial court must determine if the land has been deprived of "all economically beneficial or productive use". The petitioner maintains that the "economically beneficial or productive use" discussed in *Lucas* means the ability to construct a dwelling or other structure on the land. In support of this conclusion petitioner points to a statement made by Justice Scalia in *Lucas*:



> . . . [R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.
>
> *Lucas, supra*, 505 U.S. at 1018.

Far from indicating that use means physical construction on the property, *Lucas* recognizes that while construction is a common use of property, it is not the only use contemplated in takings analysis. Rather, a trial court must look to see if the property retains any "economically beneficial or productive option for its use". Clearly this refers to the economic impact of the regulation on the property. In *Lucas* it was undisputed that the property was rendered valueless by the regulations at issue, however petitioner has conceded that the property in the case at bar retains economic options.

The other statement relied upon by petitioner in *Lucas* is as follows:

> It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land, *Curtin v. Benson*, 222 U.S. 78, 86, 32 S. Ct. 31, 33, 56 L.Ed. 102 (1911).
>
> *Lucas, supra*, 505 U.S. at 1031.

Petitioner's reference to this quotation is taken out of context. The quotation refers to this Court's analysis of common law principles of nuisance and not the rules

connected with takings law. This Court was discussing whether the South Carolina courts were likely to find that the State's regulation of Lucas' property would be found to be a nuisance. It does not establish, as argued in the petition, that this Court held that a categorical taking occurs when a regulation prohibits building upon a parcel of land. Since Mrs. Suitum has an economic use for her land, as found by the Ninth Circuit and the District Court, her case is not ripe for adjudication and does not fall within the ambit of the *Lucas* categorical taking doctrine.

It should also be noted Mrs. Suitum has never made the assertion, prior to the instant petition, that her property was categorically taken under the *Lucas* doctrine. She should not be permitted to assert it now.

## E. THE TRIAL COURT CANNOT MAKE A DETERMINATION AS TO WHETHER MRS. SUITUM'S PROPERTY HAS BEEN TAKEN UNTIL SHE AVAILS HERSELF OF THE REGULATORY SCHEME PROVIDED.

Mrs. Suitum argues in her petition that she need not market her development rights because their value can be established through expert testimony and that TRPA need not take any further action concerning the regulation of her property. This curious argument was first asserted in the instant Petition for Writ of Certiorari. Prior to petitioning this Court, Mrs. Suitum steadfastly maintained that her development rights are worthless and that attempting to market them would be futile.



Mrs. Suitum relies on *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987), for the proposition that valuations are performed all of the time by the courts based solely upon expert testimony. Nonetheless in *Florida Rock* the plaintiff had availed itself of all of the regulatory options prior to bringing its taking claim. This Court in *Williamson*, held that a takings claim is not ripe for adjudication " . . . until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186. Petitioner concedes in her petition that TRPA must undertake an approval process in order for her to transfer her development rights. Petition for Writ of Certiorari at p. 20. Therefore Mrs. Suitum has not received a "final decision" concerning the use of her property and her claim is not ripe for adjudication. Mrs. Suitum's argument makes no more sense than to argue that the court in *Williamson, supra,* should have speculated on the likelihood that a variance would be granted.

In any case, Mrs. Suitum has raised an issue through a Petition for Writ of Certiorari which should have been raised at the trial level. This issue is not of national significance and should not justify the granting of Certiorari under Supreme Court Rule 10.

## F. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT.

Finally, Petitioner claims that the Ninth Circuit's decision in the instant case conflicts with the decision of the Seventh Circuit in the case of *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995). The petitioner misunderstands the decision in *Marusic*. Citing *Williamson Planning Comm'n v. Hamilton Bank, supra*, the Seventh Circuit noted that "[a] claim is ripe when 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' . . . That aptly describes Marusic's circumstances: the ordinance itself embodies a conclusive decision about transferability." *Marusic*, 55 F.3d at 261.

In the instant case, however, the Ninth Circuit found that the regulations were not conclusive as to Ms. Suitum's property, holding that:

> "without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. *MacDonald*, 477 U.S. at 348. Without attempting to transfer the rights she currently possesses, Suitum cannot know the 'nature and extent of permitted development[,]' *Kinzli*, 818 F.2d at 1453, and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed



> expectations, two critical components of a regulatory taking claim analysis. *Youpee v. Babbitt*, 67 F.3d 194, 197 (9th Cir. 1995).
>
> *Suitum*, Appendix A at 9.

Indeed, the Seventh Circuit in *Marusic* correctly noted:

> A claim is unripe when critical elements are contingent or unknown. When for example, a property owner alleges that general regulation affects his land in some special way, the claim is not ripe until all efforts to avoid the restriction or obtain compensation for it have been exhausted. [*citations omitted.*]
>
> *Marusic*, 55 F.3d at 260.

In light of the above it is clear there is no conflict between the Circuits and therefore the petition should be denied.

## III

## CONCLUSION

TRPA's regulatory scheme is unique and too particular to the Tahoe Basin to bear upon nationally prominent issues. The Ninth Circuit's decision is consistent with the prior rulings of this Court, as well as that of other Circuits. Additionally, the petition raises new issues which

were not addressed in the courts below. Mrs. Suitum's petition, therefore, should be denied.

DATED: September 13, 1996

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No. 96-243

In the

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,
*Respondent*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In accordance with Rule 15.6 of the United States Supreme Court Rules, petitioner Bernadine Suitum files this reply brief to respond to the additional issues raised by respondent in opposition to Mrs. Suitum's Petition for Writ of Certiorari.

## ARGUMENT

### I

### THE DECISION OF THE NINTH CIRCUIT DOES CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT

Respondent Tahoe Regional Planning Agency (TRPA) argues the Ninth Circuit decision in this case does not conflict with the decisions of this Court, particularly with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); or *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). However, TRPA's argument is based on a gross distortion of Mrs. Suitum's position. TRPA suggests Mrs. Suitum is not asserting that she has been denied all viable use of her land but only that she has been denied the ability to build a house on her property. Opposition Brief (OB) at 10-16. This is absolutely incorrect. As TRPA is well aware, throughout this litigation, Mrs. Suitum has argued that TRPA's regulations denied her all viable use of her property. This claim was set forth in the complaint and argued to both the District Court and the Ninth Circuit. First Amended Complaint (Complaint) at ¶¶ 5, 6, and 14; Reply to Opposition to Plaintiff's Cross-Motion for Summary Judgment at 1-3; Appellant's Opening Brief at 18 . The District Court ruled that the effect of TRPA's prohibition on any "land coverage or other permanent land disturbance" on Mrs. Suitum's property is to deny her the ability to "develop *or* build on the parcel of land she owns." App. D at 3 (emphasis added). The question presented for review in this Court is based on the fact that "the regulatory agency has already conclusively determined that no viable use of her parcel of land will be permitted." Petition at i.

There is no question that Mrs. Suitum has been denied all viable use of her land. She cannot seek an alternative use of her land by means of variance or other procedures and the absolute prohibition against permanent land disturbance is such as to preclude any meaningful use of her property. Unlike a variance, TDRs do not allow Mrs. Suitum the right to put her land to any actual use. TDRs merely transfer that right to another for use on other property. The TDRs offered Mrs. Suitum are, at most, a vague and uncertain prospect of some small economic exchange with a third party. They clearly are not compensation from the government for the loss of all use of property occasioned by the TRPA regulations. There is no certainty as to when or if Mrs. Suitum will ever be able to sell her TDRs or as to what economic return she will get from such a sale.

Under both *Williamson County* and *MacDonald*, Mrs. Suitum has a final agency action with respect to the uses allowed on her property. The Ninth Circuit's conclusion to the contrary is necessarily in conflict with these decisions of this Court.

Respondent claims this Court ruled in *Penn Central* that the existence of a "development right" which could be transferred negated the finding of a taking in that case. OB at 14. That, however, was not the holding of this Court in *Penn Central*.

> The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment ... and, (2) if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment. We need only address the question whether a "taking" has occurred.

*Id.* at 122.

Thus, rather than hold TDRs negate a taking claim, in *Penn Central* this Court expressly refused to address the TDR issue. Any



further discussion of the issue was dicta. Also, unlike Mrs. Suitum, Penn Central was already engaged in an economically viable use of its terminal property. The issue presented but not addressed by this Court in *Penn Central* was whether the TDRs could be considered a form of "just compensation." *Penn Central* does *not* suggest that TDRs constitute a use of the land as the Ninth Circuit held in this case.

The final agency action meted out to Mrs. Suitum was such as to deprive her of any beneficial use of her land. In fact, Mrs. Suitum has been left with fewer use options on her property than the land owner in *Lucas* where this Court found a per se taking had occurred. State law prohibited Lucas from building a house on his parcels but he could build a deck or boardwalk on his property. *Lucas*, 505 U.S. at 1009 n.2. However, this Court found that was not an adequate beneficial use. In contrast, Mrs. Suitum is not allowed even the token uses left to Lucas. TRPA bans "additional land coverage or other permanent land disturbance" on her property. TRPA Code of Ordinances § 20.4.13, Appendix F to Petition at 4.

It was this very type of draconian regulation that prompted this Court's warning in *Lucas* that

> ... [r]egulations that leave the owner of land without economically beneficial or productive options for its use-typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

*Lucas*, 505 U.S. at 1018.

Mrs. Suitum's position is clear and unequivocal. Mrs. Suitum has been denied all viable use of her property. The sale of TDRs is irrelevant to that determination. Selling TDRs is not a use of Mrs. Suitum's property. The Ninth Circuit has held, however, that the sale of TDRs is an alternative use of property and that to ripen her case, Mrs. Suitum must engage with other private parties for the transfer of those rights before there will be a final decision by the government agency on the use allowed. That decision is contrary to

this Court's holdings in *Williamson County* and *MacDonald* that require only a final determination of how a regulation will affect actual use of the owner's own property. The Ninth Circuit decision is also contrary to this Court's decision in *Lucas* that denial of all economically beneficial or productive use of property is a per se taking requiring just compensation.

## II

## THE DECISION OF THE NINTH CIRCUIT DOES CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT

Respondent's argument that there is no conflict between the Ninth Circuit's decision in this case and the Seventh Circuit's decision in *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995), is ill-conceived. OB at 18. TRPA asserts the cases are distinguishable because the Seventh Circuit found the ordinance in *Marusic* embodied a conclusive decision about transferability whereas the Ninth Circuit found it could not know whether the TRPA regulations in this case had gone too far until Mrs. Suitum tried to sell her Transferable Development Right. OB at 18. TRPA misses the point.

On the facts in this case, the Seventh Circuit would have ruled the TRPA actions resulted in a conclusive decision that no use would be allowed of Mrs. Suitum's property. The basis for the court's holding in *Marusic* was that a claim is ripe when "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Marusic*, 55 F.3d at 261. The court concluded such was the case for Marusic even though he never attempted to sell his store or transfer his liquor license. *Id.* at 261. So it is in this case. A final decision regarding the application of the TRPA regulations to Mrs. Suitum's property has been reached, even if the result of a TDR sale, if any, is unknown. This contrary ruling by the Ninth Circuit *establishes* the conflict between the Circuits this Court should resolve. It does not *preclude* the conflict as respondent seems to suggest.

The court in *Marusic* was not deterred from considering the merits of the case by any lack of effort on the part of Marusic to sell his store, and thereby attempt to transfer his liquor license. The effect of the regulation on his property interest was already apparent



to the court. "The terms of the law are clear, their application straightforward." *Id.* at 261. In fact, the court found there was nothing Marusic could do to avoid the immediate effects of the license moratorium on his property--his store. This is true in the present case. Mrs. Suitum cannot avoid the effects of TRPA's regulations on her property. Mrs. Suitum is prohibited from putting her property to any economically beneficial use. Mrs. Suitum's case was deemed unripe by the Ninth Circuit. However, in the Seventh Circuit, pursuant to the precedent of *Marusic*, Mrs. Suitum's case would have been deemed ripe. This is the very type of inconsistent application of the law caused by a conflict in the Circuits that should be resolved by action of this Court.

## III

## ALL ISSUES RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE RAISED IN THE COURTS BELOW

TRPA argues that Mrs. Suitum has improperly raised issues for the first time in her Petition for Writ of Certiorari. OB at 8-9. TRPA is incorrect.

First TRPA claims that Mrs. Suitum never asserted prior to her petition that "the only use of property [is] the ability to construct a residence on it." *Id.* at 8. Mrs. Suitum agrees that she has not made this assertion. Obviously, depending on the physical and regulatory circumstances related to a piece of property, it can be put to all manner of uses. In Mrs. Suitum's case, however, she has asserted from the first stages of the litigation that TRPA has prohibited her from constructing a single-family residence or making any other use of her residentially zoned lot. Complaint at ¶¶ 5, 6, and 14.

Next, TRPA complains that "[n]owhere below did petitioner argue that restrictions prohibiting construction on land amount to a taking per se." OB at 8. TRPA again misstates Mrs. Suitum's position. Mrs. Suitum has alleged all along that TRPA has deprived her "of all reasonable and economically viable use" of her lot. Complaint at ¶ 6. Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, this allegation, if proven, constitutes a per se taking. As in *Lucas*, TRPA's regulations "leave the owner of land without economically beneficial or productive options for its use ... by requiring land to be left substantially in its natural state." *Lucas*,

505 U.S. at 1018. Thus, the per se taking argument was presented in her complaint by arguing that she was deprived of all economically viable use of her lot.

And last, TRPA claims that by alleging in her petition that the economic impact of TRPA's regulations can be established without marketing her TDRs, Mrs. Suitum has improperly raised a new legal theory as to why her takings claim is ripe. OB at 9. This argument is not, however, a new "legal theory." The actual value of the TDRs has yet to be determined, but that valuation is irrelevant to the finality prong of the *Williamson County* ripeness doctrine which is the basis for the Ninth Circuit's decision. Under *Williamson County*, the decisions of the government agency are final when the impact of the relevant regulation on the uses of the property is certain. In this case, the impact of TRPA's regulation on Mrs. Suitum's property is certain. Mrs. Suitum has been denied all beneficial use of her land.

In any event, as this Court stated in *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." (Citations omitted.) Mrs. Suitum properly raised her federal takings claim in the courts below and has defended the ripeness of that claim ever since it was put in issue by TRPA. All of Mrs. Suitum's arguments are properly before this Court.

## IV

## THE ISSUES BEFORE THE COURT ARE ISSUES OF NATIONAL IMPORTANCE

Respondent suggests that because TRPA's TDR program is complicated and limited to the Lake Tahoe Basin, the question of whether a TDR process must be undertaken before a takings claim can ripen is of only local importance. OB at 10. To the contrary, the jurisdictional scope of TRPA's TDR program has no relevance to the legal importance of this case. In fact, every property regulation that comes before this Court is limited geographically because by definition regulation of property use is a matter of local concern. If TRPA's argument had any weight, this Court would never have accepted for review *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (overturning California Coastal Commission's



permit conditions for one house on Ventura coast as constituting an unconstitutional regulatory taking); *Dolan v. City of Tigard*, 512 U.S. ____, 114 S. Ct. 2309 (1994) (overturning one city's permit conditions for enlarging plumbing supply store as constituting an unconstitutional regulatory taking); or for that matter *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (upholding cities' denial of permit under its local zoning regulations to expand vertically Penn Central station as not constituting a regulatory taking). Here, like in *Nollan*, *Dolan*, and *Penn Central*, the Court is presented an issue of fundamental importance to property owners as well as to land use regulatory agencies across the country. Can a TDR scheme like TRPAs be used strategically by regulatory agencies to block a judicial determination of whether a regulatory taking has occurred even though that agency has already denied a property owner all economically viable use of her property? As explained in the Petition for Writ of Certiorari at 16, if allowed to stand, the Ninth Circuit's decision will have effectively overruled the per se regulatory taking rule established by this Court in *Lucas*. The national importance of such an outcome is obvious.

## CONCLUSION

Respondent has denied Mrs. Suitum the right to any economic use of her vacant residential lot. Respondent requires that it be left in a natural state. Because there is no mechanism available to change this decision so as to allow Mrs. Suitum any use of her property, Mrs. Suitum's claim for a regulatory taking is ripe, *now*. The Ninth Circuit's decision would force Mrs. Suitum to embark on a quixotic attempt to market TDRs to other regulated property owners before she can file a takings claim. The purported ability to market TDRs, however, does not transform TRPA's *final* determination that Mrs. Suitum cannot put her land to productive use into a *nonfinal* action. The Ninth Circuit has simply conjured another burdensome procedure that a landowner must satisfy prior to seeking judicial relief. But this procedure is divorced from the question of whether an agency has reached a final decision on the use of her property. If this sort of procedure is condoned, there is no end to the creative procedural roadblocks that land use agencies can be expected to invent in order to avoid takings claims. In effect, the Ninth Circuit's

decision, if not overturned, will eviscerate this Court's per se regulatory taking category and expand beyond all anticipation the ripeness standards prescribed by this Court in its previous decisions.

Accordingly, petitioner Bernadine Suitum respectfully urges the Court to grant the Petition for Writ of Certiorari.

DATED: September, 1996.

Respectfully submitted,

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No. 96-243

In the

# Supreme Court of the United States

October Term, 1996

**BERNADINE SUITUM,**
*Petitioner,*

**v.**

**TAHOE REGIONAL PLANNING AGENCY,**
*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER, BERNADINE SUITUM

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No. 96-243

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER BERNADINE SUITUM**

Pursuant to Supreme Court Rule 37, the Tahoe-Sierra Preservation Council, Inc. respectfully moves this Court for leave to file the attached Amicus Curiae brief in support of Petitioner Bernadine Suitum. Written consent to the filing of this brief has been granted by counsel for the Petitioner, and has been lodged with the Clerk of this Court. Respondent Tahoe Regional Planning Agency, acting through its Counsel of Record, has refused to grant its consent, necessitating the filing of this Motion.

Amicus Curiae Tahoe-Sierra Preservation Council, Inc., is a non-profit membership corporation organized under the laws of the State of California for the purpose of representing the interests of its approximately 2000 members, each a Lake Tahoe Basin property or business owner, before the applicable regional, state, and local regulatory agencies. The Tahoe-Sierra Preservation Council is also the lead plaintiff, along with approximately 450 of its individual members who are also named-plaintiffs, in twin lawsuits now consolidated and pending in the U.S. District Court, District of Nevada, before the Honorable Edward C. Reed (Case No. CV-N-84-257 ECR) involving "takings claims" brought against the Respondent Tahoe Regional Planning Agency ("TRPA"). Those pending cases have been before the Ninth Circuit Court of Appeals on three separate occasions, and include:

- *TSPC I* – *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990), cert. den. 499 U.S. 943 (1991)

- *TSPC II* – *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency*, 938 F.2d 153 (9th Cir. 1991)

- *TSPC III* – *Tahoe Sierra Preservation Council, Inc., et al., v. Tahoe Regional Planning Agency*, 34 F.3d 753 (9th Cir. 1994), cert. den. __U.S.__, 115 S. Ct. 1401 (1995)

The issues at stake in the instant lawsuit which is the subject of the Petition for Writ of Certiorari are also issues involved in the aforementioned pending litigation brought by the Amicus Curiae against TRPA, and are otherwise issues of vital concern to all affected property owners in the Lake Tahoe Basin who are subject to the regulatory requirements of TRPA.* Accordingly, the Tahoe-Sierra Preservation Council has a strong and direct interest in the proper resolution of these important Constitutional issues, given the impact of the regulatory provisions adopted by TRPA upon

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* Counsel of Record for the Amicus Curiae is also counsel in a case now pending before the U.S. District Court, Eastern District of California, in which issues directly involving those addressed in the instant Petition are being raised as a defense by TRPA -- *Tahoe Regional Planning Agency v. Romolo and Helen Barbieri*, E.D. of Calif., No. CVS-94-1380 LKK.



the Council's members and other property owners within the Lake Tahoe Basin.

Amicus seek here to augment the arguments set forth in the Petition for Writ of Certiorari, and to provide to this Court the perspective of an organization that is intimately familiar with the workings of the Respondent TRPA and the effects of the regulatory provisions at issue on Lake Tahoe Region property owners.

For the foregoing reasons, the Tahoe-Sierra Preservation Council respectfully requests that their Motion to file the accompanying Amicus Curiae Brief be granted.

DATED: September 4, 1996.

Respectfully submitted,

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## BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER BERNADINE SUITUM

## INTERESTS OF AMICUS CURIAE

The interests of the Amicus Curiae Tahoe-Sierra Preservation Council, Inc., are set forth in the preceding Motion and are adopted herein.

## SUMMARY OF ARGUMENT

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that where a governmental land-use regulatory agency adopts a regulation prohibiting a private property owner from making ***all*** economically beneficial use of his or her private property in the name of the common good by banning any building or other structures on that property, a "categorical taking" has occurred triggering the Just Compensation requirements of the Fifth Amendment. The facts at issue in the instant case fit the *Lucas* categorical takings rule like a glove with one new twist. To insulate itself from a "takings challenge", the Respondent TRPA, the regulatory agency involved, simply appended to its total prohibition-on-use regulation a post-takings "transferable rights (TDR)" scheme by which the property owner could theoretically recoup a small portion of the lost value of her valuable property by selling to another

private party certain so-called "transferable rights" bestowed on her by the agency after they prohibited all use of her property. The Ninth Circuit, muddling the concept of potential post-takings recoupment of lost value with the denial of all "use" upon the adoption of the regulation as instructed by *Lucas*, effectively created a gaping new hole in the *Lucas* categorical takings rule by requiring that the property owner -- whom it is undisputed is now totally precluded from building upon her vacant homesite parcel -- first fully exhaust this agency-created, post-takings TDR scheme before her takings claim is deemed judicially "ripe".

Further, given the high-profile role of the Respondent TRPA and the widespread attention throughout at least the Western United States given to TRPA's creative and far-reaching regulatory provisions, it is apparent that if the Ninth Circuit's decision is allowed to stand, the doors will now be wide open to numerous other land-use and environmental regulatory agencies to pursue the same course of action -- that is, to attempt to insulate their open space, greenbelt, wetlands, watershed protection, and related regulatory programs from judicial challenge by merely appending an equally creative, post-takings TDR scheme to make "unripe" the very takings claims this Court has already found in *Lucas* to be "categorical". Accordingly, if this Court's decision in *Lucas* is to be respected by land-use regulators across the land, it is essential that this Court quickly respond to this new flair up of creative resistance to the dictates of the Fifth Amendment by agreeing to hear and to decide these extremely important Constitutional issues raised by the decision of the Ninth Circuit below.



## REASONS FOR GRANTING THE WRIT

## I

## THE NINTH CIRCUIT'S DECISION IN THIS CASE, IF ALLOWED TO STAND, DRIVES A GAPING HOLE INTO THE "CATEGORICAL TAKINGS RULE" CAREFULLY CONSIDERED AND ARTICULATED BY THIS COURT IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

Four years ago, this Court determined under facts remarkably similar to the facts of the instant case that a property owner who has been denied ***all*** economically beneficial ***use*** of his or her vacant single-family residential property as a result of the adoption or application of a governmental land-use regulatory enactment has suffered a "categorical taking" invoking the protection of the Fifth Amendment. Thus, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court attempted to set this long-lingering issue to rest when it held:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Id.* at 1019. [emphasis in original]

In *Lucas*, this Court carved out only one narrow exception to the "categorical rule" it enunciated, which exception is not relevant here -- i.e., where the regulation deprives the landowner of all economically beneficial use of his or her land, the State "may resist compensation only if

. . . [it] shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027.

Nowhere in *Lucas* did the Court suggest or even hint that there may be still another gaping hole or exception in the protections afforded by the Fifth Amendment, such as that now suddenly fashioned by a creative environmental regulatory agency and upheld by the District Court and the Ninth Circuit in the case of the Petitioner, Mrs. Suitum.[1] That new "exception" if allowed to stand -- a carefully-crafted litigation defense mechanism under the rubric of "transferable development rights (TDRs)" -- will most likely quickly be latched onto by numerous land-use regulators, at least throughout the Ninth Circuit, as a way to help protect them from suit, thus threatening to again submerge the well-articulated substantive rule in *Lucas* into a new procedural quagmire.

To hear the Ninth Circuit describe this newly-created ripeness barrier or "exception" to the *Lucas* categorical takings rule, all the regulatory agency has to do when it adopts a land-use regulation prohibiting ***all*** economically beneficial ***use*** of a person's private property in the name of the common good is to be sure to include a provision granting that property owner some form of post-takings "transferable rights"[2] -- purported new "rights" the property

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[1] Inexplicably, in spite of the clear import of this Court's decision in *Lucas v. South Carolina Coastal Council, supra*, the Ninth Circuit in their Opinion in the instant case made no mention of or reference to *Lucas*, nor did it offer any explanation whatsoever as to why it did not consider *Lucas* to be relevant to its analysis.

[2] The post-takings TDR program implemented by TRPA is applicable only to property owners whose lands have already been designated by TRPA as "environmentally



owner may or may not be able to sell at some unknown point in the future to some unknown buyer, and for some unknown amount of dollars, in a secondary TDR marketplace created solely by the agency by placing an artificial limit on the availability of those "rights" to other property owners. Thus, by the magic stroke of the regulator's pen, the agency is again able to insulate itself from a takings challenge, at least according to the Ninth Circuit, until the property owner whose land has been prohibited from use first demonstrates that he or she has attempted to fully navigate this new TDR minefield by showing how or in what manner the purported TDR "rights" did or did not ultimately provide that owner with any modicum of post-takings compensation. The result is to place an enormous if not impossible new burden on the property owner, thus effectively blunting the clear dictates of the *Lucas* categorical takings rule.

It requires little foresight to anticipate how creative and determined land-use regulators and governmental attorneys, just like those employed by the Respondent TRPA, will now latch onto this new tool in their arsenal and turn their energies to fashioning the most high-sounding, seemingly plausible, "TDR systems" to be incorporated as part of their regulatory prohibitions, so as to leave at least the superficial impression they really have not "taken" ***all use*** because they have also allowed the beleaguered property owner new "rights" to be sold in an agency-created TDR marketplace.

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sensitive", and thereby made ineligible for building by TRPA. At that stage, once a property owner's property is so designated by TRPA, the property owner then becomes eligible by TRPA to pursue one of the highly speculative TDR options as a means to possibly recoup some very limited dollars for the loss of value of his or her property -- but not to restore any actual viable ***use*** to that property.

The stark reality is that the cleverly-crafted "TDR gimmick" fashioned by TRPA as part of its regulatory scheme has nothing at all to do with Mrs. Suitum's ***use*** of her property, but in fact is merely a transparent attempt to allow her the possibility of recouping some limited post-takings compensation in a secondary private marketplace created by TRPA to help defend it from a total takings claim.[3] Unfortunately, both the District Court and the Ninth Circuit fell for this gimmick lock, stock and barrel -- concluding that in fact the "transfer of development rights"

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[3] It is undenied that TRPA affirmatively prohibited *all **use*** of Mrs. Suitum's vacant residential lot, which she and her now deceased husband owned for many years in anticipation of building a retirement home, by its designation of the parcel as an "SEZ property" with a "zero IPES score". The consequence of that designation was that Mrs. Suitum was totally prohibited from placing a home or any other structure or "land coverage" on her property. To hammer the last nail into the proverbial coffin, TRPA also ordained that even if Mrs. Suitum decided to exercise her precious new "right" to sell one or more of the TDRs they had belatedly bestowed upon her, she must first agree to record a so-called "Deed Restriction" which "permanently retired" her lot -- that is, requiring her to "voluntarily" agree to permanently greenbelt her lot in order to exercise her "privilege" to recoup some meager portion of her lost "value" by selling one of the TDR rights, assuming she could even find a buyer. And, to add further insult to injury, according to the Ninth Circuit Mrs. Suitum had no ability to seek redress in the courts unless and until she first attempted to sell one of those TDR rights, and if she were successful in finding a buyer, first "Deed Restricting" her property, at which point her case would finally "ripen" sufficiently so that she could then be allowed to pursue the protection of her Constitutional rights in the federal courts.



purportedly made available to Mrs. Suitum created a new ***use*** of her property that must first be fully exhausted and evaluated as part of the "takings calculus" (Dist. Crt's. Order, App. C at C-3) before she could file and pursue her takings claim in federal court. But the unvarnished truth is this TDR gimmick -- no matter how high-sounding its label -- has nothing whatsoever to do with the ***uses*** available to Mrs. Suitum on her property, but only with the possible recoupment at some later point of some meager damages for the loss she has already suffered resulting from TRPA's total prohibition of ***any use*** of her valuable residential parcel.

*Lucas* leaves no question that the proscriptions of the Fifth Amendment that "private property shall [not] be taken for public use, without just compensation" means exactly what it says. As was repeatedly underscored by this Court in *Lucas*, the central focus is necessarily on the ***uses*** that have been circumscribed by the governmental regulation at issue, that is the ***uses*** which remain after the regulation has become effective, not on the amount of devaluation of the property due to the regulations. Time and time again, this Court in *Lucas* stressed this primary focus as to the ***uses*** which remained after the regulation's adoption. See, for instance, the discussion in the majority opinion in *Lucas* at 1015: "The second situation in which we have found categorical treatment appropriate is where regulation denies all ***economically beneficial or productive use*** of land"; and at 1015, citing *Agins v. Tiburon*, 447 U.S. 255 at 260, ". . . the Fifth Amendment is violated when regulation . . . denies an owner ***economically viable use*** of his land"; and at 1016, citing *Keystone v. Bituminous Cole v. DeBenedictis*, 480 U.S. 470 at 495: "A statute regulating the ***uses*** that can be made of property effects a taking if it 'denies an owner ***economically viable use*** of his land'"; and at 1016, ftnt. 7: ". . . the force of our 'deprivation of ***all economically feasible use***' rule is greater than its precision . . ."; and at 1019: ". . . when the owner of real property has been called upon to sacrifice ***all economically beneficial uses*** in the

name of the common good, that is to have his property economically idle, he has suffered a taking."

In the case of Mrs. Suitum -- as was the case with Mr. Lucas's beachfront property in South Carolina -- there is simply no dispute that the regulations adopted by TRPA in the name of environmental protection did in fact deny her ***all*** further ***use*** of her vacant, single-family residential parcel located in an established, nearly built-out, residential neighborhood. This was achieved simply by designating her lot as a protected "Stream Environment Zone (SEZ)" parcel, and then flatly prohibiting any "new land coverage or other permanent land disturbance" on her parcel. App. E at E-1. Upon the date of the adoption of the SEZ designation, Mrs. Suitum's private property became entirely ***useless*** -- there being no economically viable beneficial ***use*** to which she could thereafter put her homesite parcel. In a nearly identical manner, the South Carolina Beachfront Management Act as it was implemented by South Carolina's Coastal Council also placed Mr. Lucas's single-family residential lots in a similar "coastal protected area", as to which all new "occupiable improvements was flatly prohibited." *Lucas*, 505 U.S. at 1009. In any event, it cannot and has not been disputed that the clear effect of TRPA's regulatory enactment at issue was to prohibit the construction of a home on Mrs. Suitum's single-family homesite, the only remaining ***use*** that would otherwise be consistent with the underlying zoning and "allowed uses" in the surrounding residential neighborhood, all in the name of "environmental protection" for the common good.

Interestingly, in *Lucas* the regulations there at issue would have allowed Mr. Lucas to actually construct certain small walkways and decks on his beachfront parcel having a total area of not more than 144 square feet, which even this Court found hardly was a viable "use" sufficient to defeat his takings claim. See *Lucas*, 505 U.S. at 1009, ftnt. 2. In contrast, the TRPA regulations at issue did not allow Mrs.



Suitum to make even that minimal "use" of her property by constructing a similar small structure on her property. Instead, TRPA allowed her only the "right" to transfer (sell) up to 183-square feet of "land coverage" to another property owner to in turn be "used" only on that purchaser's property (TRPA also restricted the base amount of "land coverage" available on the other potential purchaser properties), assuming Mrs. Suitum could even find a purchaser.

Of course, if the Ninth Circuit is right, then South Carolina blew it when they drafted their statute allowing Mr. Lucas to actually build 144 square feet of structures on his property, rather than simply allowing him the "right" to transfer that potential construction area to someone else's property, and thereby to recoup some of the dollars that he may have lost in the value of his land due to South Carolina's similar prohibitions on use. How easy it would have been for South Carolina to have avoided Mr. Lucas's takings challenge if only they had known and understood the magic powers of TDRs as now fashioned by the Ninth Circuit. All South Carolina really needed to have done, instead of actually allowing Mr. Lucas to build up to 144 square feet of walkways on his property, was to allow him to "sell" that purportedly valuable "right" to his neighbor or some other restricted property owner -- in which case, according to the Ninth Circuit, the Coastal Council could have insisted that Mr. Lucas first make every effort to sell that valuable "right", determine its actual value, or show that he was not able to sell that "right" before he could pursue his takings claim in court.

The central flaw in the Ninth Circuit's analysis is that it has fallen into the very trap TRPA intended -- allowing TRPA to redefine and refocus the entire taking's inquiry, and again placing a monumental burden back on the property owner to show he or she has "ripened" his or her case before seeking the judicial redress for the "total taking" *Lucas* clearly held to be "categorical". The upshot is that the

analysis is no longer focused on the ***uses*** that were precluded to Mrs. Suitum, and whether TRPA in fact denied her *all* beneficial and productive ***use*** of her land, but instead whether Mrs. Suitum can now meet a new post-takings burden imposed upon her to show she has fully exhausted the highly complex TDR system created by TRPA to attempt to recoup a small part of her takings damages. This, of course, places an enormous if not impossible new burden upon the property owner to demonstrate the "ripeness" of his or her case by first showing that he or she has done everything possible to find a buyer in the secondary private marketplace created by TRPA willing to purchase a "right" allegedly bestowed by TRPA to buy "land coverage" or an "allocation", a TDR right available only to a property owner whose property has already been made subject to a total and permanent building prohibition.

Of course, the post-taking sale of that "transferrable development right", even if consummated, is in fact nothing more than the sale of a "chit of paper" that results at best in the recoupment by Mrs. Suitum of a few meager dollars, and has nothing whatsoever to do with the ***uses*** to which Mrs. Suitum can now put her own property.[4] But, in muddling the concept of "***uses***" with the concept of "***value***", the Ninth Circuit found that even if Mrs. Suitum could only recoup a very small part of her lost value by the sale of a TDR, that would defeat her takings claims, as "regulatory ordinances that merely diminish the value of property [do] not constitute a taking." App. A at A-12. The difficulty is that by focusing its attention on this issue of potential recoupment of

[4] The Ninth Circuit, in their haste to avoid facing Mrs. Suitum's takings claim head-on, also summarily found without citation to any precedent "that within that [TRPA regulatory] scheme, transfer of development rights is a 'use' of SEZ property". App. A at A-9.



"value," the Ninth Circuit lost sight of the fact that the Fifth Amendment, as *Lucas* instructs, commands that the focus be on the "***uses***" precluded. As *Lucas* makes clear, if it is found a regulation prohibits *all* economically beneficially ***uses***, that is the end of the inquiry. No post-taking remedy designed merely to provide the property owner with the speculative ability to recoup some limited dollars in the private marketplace for the taking which has already occurred should have any relevance, once a categorical taking is found to have occurred.

## II

## THE TDR MECHANISM BLESSED BY THE NINTH CIRCUIT IN THE INSTANT CASE IS LIKELY TO BLOSSOM INTO THE PREFERRED TAKINGS-DEFENSE TOOL BY LAND-USE REGULATORS, AT LEAST IN THE NINTH CIRCUIT, UNLESS QUICKLY NIPPED IN THE BUD BY THIS COURT

Is this a situation limited only to Mrs. Suitum? Certainly not in the Lake Tahoe region, where the bi-state TRPA regulatory agency has attempted to insulate itself from "takings claims" arising from its otherwise pervasive prohibitions on the use of hundreds of vacant single-family homesites by the simple magic of allegedly making available a post-takings TDR system as an option to the beleaguered property owners. In that regard, the Amicus in the instant case, a non-profit membership organization, is currently representing hundreds of property owners whose lands have otherwise been totally "taken" by TRPA. For over twelve years, those property owner-plaintiffs have been pursuing their claims to Just Compensation for that taking in the federal courts, as against the several defenses raised by TRPA, including in part the same "TDR defense" at issue in the *Suitum* case. See, *Tahoe-Sierra Preservation Council, et*

*al. v. Tahoe Regional Planning Agency* ["*TSPC I*"], 911 F.2d 1331 (9th Cir. 1990), cert. den. 499 U.S. 943 (1991); *Tahoe-Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency* ["*TSPC II*"], 938 F.2d 153 (9th Cir. 1991); and *Tahoe-Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency* ["*TSPC III*"], 34 F.3d 753 (9th Cir. 1994), cert. den. ____ U.S. ____, 115 S. Ct. 1401 (1995). Also, See *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316 (D. Nev. 1992).

Given the prominent role of the TRPA and its high profile regulatory program in the Lake Tahoe Basin, and given the widespread attention throughout California and the Western United States to the creative and far-reaching regulatory mechanisms being attempted by TRPA, it is all too apparent that should the Ninth Circuit's decision be allowed to stand in this case, the doors will be wide open to numerous other state and local land-use and environmental regulatory agencies to pursue the same course of action -- that is, to attempt to insulate their newly-adopted open space, greenbelt, wetlands, watershed protection, and other similar regulatory requirements barring all use of private property by merely appending thereto a comparable post-takings TDR mechanism requiring exhaustion by the property owner, thereby at a minimum significantly delaying if not avoiding altogether an affected property owner's takings challenge in court.

In brief, if this Court's decision in *Lucas* is to be respected by land-use regulators in the Ninth Circuit, if not across the land, it is essential that the Court quickly respond to this new flair up of creative resistance to the clear dictates of the Fifth Amendment and the legal principles this Court so carefully articulated and mandated in *Lucas*. Should the Ninth Circuit's decision in *Suitum* be allowed to stand, it is clear that the courthouse doors will not only effectively be barred to Mrs. Suitum, but most likely will be closed to scores of others who will soon find their properties totally



from any viable "use" in the name of environmental protection, thereby again denying them an effective, judicially-protected remedy under the Fifth Amendment.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Ninth Circuit at issue in the instant Petition is not only in direct conflict with the express holding of this Court in *Lucas v. South Carolina Coastal Council* and other well-established case law, but threatens to undermine the essential protections afforded to private property owners by the Fifth Amendment. Accordingly Amicus Curiae respectfully urges this Court to grant the Petition for Writ of Certiorari in order to hear and decide these extremely important Constitutional issues.

DATED: September 4, 1996.

Respectfully submitted,

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No. 96-243

In the

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
*Petitioner*,
v.
TAHOE REGIONAL PLANNING AGENCY,
*Respondent*.

On Petition for Writ of
Certiorari to the United States Court
of Appeals for the Ninth Circuit

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

This motion of Tahoe Lakefront Owners' Association (TLOA) to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 37(b). Counsel for petitioner, Pacific Legal Foundation, has consented to the filing of this brief and that consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for Tahoe Regional Planning Agency (TRPA).

TLOA, incorporated as Shorezone Property Owners Association, Inc., is a nonprofit Nevada Corporation. Most of TLOA's members own lakefront property on Lake Tahoe in California or Nevada, although ownership of lakefront property is not required for membership. TLOA monitors and advises regulatory bodies, such as TRPA, on issues of planning and regulation of recreational and residential facilities on property located along the shore of Lake Tahoe.

It is TLOA's position that the transferable development rights program created by TRPA is nothing more than a scheme to allow government to avoid its duty to compensate landowners for overregulation of their property. Amicus firmly believes that a review of this matter is necessary in order that the constitutional issues involved may be properly considered. The decision below allows government entities to create property rights which impose an insurmountable barrier to landowners with valid claims under the Fifth Amendment to the United States Constitution.

For the foregoing reasons, TLOA requests that the motion to file the annexed brief amicus curiae be granted.

DATED: September 5, 1996.

Respectfully submitted,

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# BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

## INTEREST OF AMICUS CURIAE

The interest of amicus is set forth in the preceding motion for leave to file this brief.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 359 (9th Cir. 1996).

## STATEMENT OF THE CASE

## INTRODUCTION

The facts of this case, as set forth in petitioner Bernadine Suitum's Petition for Writ of Certiorari and herein adopted, raise the issue of whether transferable development rights must be sold before a landowner may bring a takings claim under the Fifth Amendment to the United States Constitution.

The issue arose after Ms. Suitum filed an action in the United States District Court, District of Nevada, asserting that restrictions imposed by the Tahoe Regional Planning Agency (TRPA) on the use of her property amounted to a taking of private property for public use without just compensation and a violation of civil rights. The District Court, ruling on TRPA's motion for summary judgment, acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred to the property at issue." Nevertheless, the District Court held that because Ms. Suitum had not applied to transfer development rights created by TRPA, her claims were not ripe for judicial review.

The Ninth Circuit Court of Appeals upheld the District Court's decision. The decision allows government to create an intricate system of sham property rights which effectively precludes landowners from bringing claims seeking just compensation for public use of their property. The decision creates an unfortunate precedent regarding the role of transferable development rights in a takings action.

## SUMMARY OF ARGUMENT

A transfer of development rights program should not be permitted to preclude a takings action when that program is inherently unfair and thus unconstitutional. Under this Court's holding in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, 191 (1985), a property owner must obtain a final decision regarding development of his or her property before challenging application of a regulation limiting development. ***Williamson County*** does not require a landowner to pursue



unconstitutional procedures, futile procedures, or procedures creating undue hardship in order to obtain a final decision at the administrative level.

## ARGUMENT

### I

### THE TRANSFER OF DEVELOPMENT RIGHTS PROGRAM IS UNCONSTITUTIONAL; THUS, PARTICIPATION IN THAT PROGRAM CANNOT SERVE AS A PREREQUISITE TO A TAKINGS CLAIM

TRPA's determination that Ms. Suitum's property is located in a Stream Environment Zone (SEZ) precludes any development on her property. The right to build a home on one's own property, particularly when that property is located in an established subdivision, is a property right within the meaning of the Fifth Amendment to the United States Constitution. ***Nollan v. California Coastal Commission***, 483 U.S. 825, 845 n.2 (1987).

Deprivation of such a property interest compels due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. Due process limits government action by preventing enforcement of unreasonable, arbitrary or capricious laws, and by requiring a substantial relation between government action and the objective sought to be attained. ***Pruneyard Shopping Center v. Robins***, 477 U.S. 74, 85 (1980). The transfer of development rights (TDR) program created by TRPA does not meet those standards.

TRPA's TDR program allows Ms. Suitum to transfer to the owner of a development-eligible lot a residential

development allocation (if Ms. Suitum could acquire one from the county by lottery) (Tahoe Regional Planning Agency Code of Ordinances (TRPA Code) §§ 34.3.A and 34.3.D), residential development rights (TRPA Code § 34.2.A), and additional land coverage for the transferee's property (TRPA Code § 20.3.C(2)(c)). In exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to keep the land forever in its natural state. (TRPA Code §§ 20.3.C(7)(a), 34.2.B, 34.3.G, and 34.5.B. TRPA provided evidence, accepted by the Court of Appeals, that Ms. Suitum's TDR's are valued between $10,000 and $30,000. ***Suitum v. Tahoe Regional Planning Agency***, 80 F.3d 359, 363 (9th Cir. 1996). The TDR program is unreasonable, arbitrary, and capricious because it requires the owner of property in an SEZ to essentially quitclaim property rights in exchange for a fraction of the value of the property.

The March 30, 1994, Order of the District Court states that the TDR program created by TRPA was designed to provide relief to owners of property in the SEZ. Even if that is so, in practice the program does not assist property owners prohibited from developing their properties. Uncontroverted evidence submitted by Ms. Suitum and disallowed by the Court of Appeals (***Suitum***, 80 F.3d at 363) shows the TDR program has never produced any sales and there is no market for TRPA's development rights.

In ***Fred F. French Investment Co., Inc. v. City of New York***, 350 N.E.2d 381 (N.Y. App.), ***reargument denied***, 356 N.E.2d 491, ***appeal dismissed, cert. denied***, 429 U.S. 990 (1976), the court explained the folly of transferable development rights.

> "[T]he development rights of the parks were not nullified by the city's action. In an attempt to preserve the rights they were severed from the real property and made transferable to another section of



mid-Manhattan in the city, but not to any particular parcel or place. There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. The acceptance of this contingency-ridden arrangement, however, was mandatory under the amendment.

"The problem with this arrangement ... is that it fails to assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property. By compelling the owner to enter an unpredictable real estate market to find

> a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed." ***Id.***, 350 N.E.2d at 387-88 (citations omitted).

TRPA's TDR program is simply a scheme by which TRPA avoids compensating overregulated property owners. Owners of property falling within the SEZ must attempt to sell TDR's for which there is no market, and owners of development-eligible property are forced to purchase property rights which they would have had but for TRPA's actions.[1] This compensation avoidance scheme may advance government's interest in saving money, but it does nothing to serve landowners under TRPA's jurisdiction. A regulatory scheme designed as a ruse to avoid paying full condemnation damages is a clear violation of due process and cannot serve as a prerequisite to a takings claim.

---

[1] TRPA's program limiting development of property outside the SEZ and allowing landowners to circumvent those limitations by purchasing TDR's fails to meet standards clearly articulated by this Court. ***See***, ***Nollan v. California Coastal Commission***, 483 U.S. at 837 (There must be a nexus between government action and the end advanced as the justification for the action.); ***Dolan v. City of Tigard***, 512 U.S. ___, 129 L. Ed. 2d 304, 320 (1994) (A public entity "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.).



## II

## ATTEMPTS TO TRANSFER DEVELOPMENT RIGHTS WOULD BE FUTILE

A constitutional challenge to a land use regulation is ripe only after a landowner has received a final decision from the government agency charged with implementing the regulation. ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. at 186. This requirement assures that a government agency has every opportunity to allow development of the particular property in question before a case is adjudicated. ***Hodel v. Virginia Surface Mining and Reclamation Association, Inc.***, 452 U.S. 264, 297 (1981). A landowner must apply and reapply to develop a piece of property until it is clear no development of the property will be allowed. ***MacDonald, Sommer & Frates v. County of Yolo***, 477 U.S. 340, 351-52 (1986). However, such actions may be excused where further attempts to obtain acceptance of a development proposal would be futile. ***Hoehne v. County of San Benito***, 870 F.2d 529, 534 (9th Cir. 1989).

The question of whether a final decision has been rendered by a government agency is one of fact to be determined on a case by case basis.

> "Fortunately for the federal courts, the solution to this problem [whether a final decision has been reached] is not achieved by color-matching putative precedents and comparing snippets from stated rationales contained in past cases. As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and [the Ninth Circuit Court of Appeals] are extremely fact-specific. Only the facts tell us whether a final decision had been reached." ***Id.*** at 533.

The facts of Ms. Suitum's case reveal that TRPA reached a final decision regarding development of Ms. Suitum's property. Ms. Suitum is prohibited from pursuing any development of her property. TRPA Code § 20.4. The Ninth Circuit determined that Ms. Suitum must also submit an application for the transfer of development rights before her takings claim is ripe. The required application to TRPA is an approval form for the actual transfer to the receiving parcel which must already be identified. ***See*** Transfer Approval Form.

Uncontroverted evidence submitted by Ms. Suitum and disallowed by the Court of Appeals demonstrates that there is no market for the development rights. The Court of Appeals disregarded that evidence, set forth in the affidavit of Paul Kaleta, a former TRPA staff member familiar with TRPA ordinances and application procedures for transfer of development rights, because Mr. Kaleta was not determined to be an expert in valuing development rights. ***Suitum***, 80 F.3d at 363.

However, valuation of development rights is not the issue when attempting to determine whether submission of an approval form for the transfer of development rights would be futile. The issue is whether an attempt to transfer the development rights would be futile, thus excusing the landowner from pursuing that avenue. Mr. Kaleta was qualified to testify as to whether development rights have ever been sold, and exclusion of his testimony was an abuse of discretion.

It would be futile for Ms. Suitum to attempt to transfer the development rights created by TRPA because there is no market for those rights. A final decision has been rendered in this case, and Ms. Suitum should be allowed to litigate the substantive issues of her case.



## III

## THE NINTH AND SEVENTH DISTRICTS HAVE ADOPTED INCONSISTENT APPROACHES TO DETERMINING WHETHER A CASE IS RIPE UNDER *WILLIAMSON COUNTY*

The Seventh Circuit Court of Appeals, in ***Marusic Liquors, Inc. v. Daley***, 55 F.3d 258, 260-61 (7th Cir. 1995), held that the owner of a liquor store did not have to try to sell his business before bringing an action to challenge an ordinance restricting the transfer of liquor licenses. The court determined that the final decision ripeness doctrine, as described in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, was satisfied.

Cases cited by the Seventh Circuit Court of Appeals, examined the hardship to the parties if judicial action is postponed. ***See Abbott Laboratories v. Gardner***, 387 U.S. 136, 148-49 (1967) (A court must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration when determining whether a case is ripe for judicial resolution.); ***Triple G Landfills, Inc. v. Board of Commissioners of Fountain County, Indiana***, 977 F.2d 287, 289 (7th Cir. 1992) (The court reviewed the scope and practical effect of the ordinance in question to determine hardship to the parties resulting from delay of judicial review.).

The Ninth Circuit Court of Appeals did not examine the hardship Ms. Suitum would suffer if required to transfer development rights. As discussed above, in exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to keep the land forever in its natural state. Ms. Suitum would have to prematurely quitclaim her property rights in exchange for a fraction of the value of the property. This would create a tremendous hardship because

TRPA's regulations creating the SEZ, as applied to Ms. Suitum's property have effectively taken her property without compensation.

## CONCLUSION

This Court has not directly addressed the issue of the legality of TDR schemes.[2] The TDR program adopted by TRPA provides clear evidence of the inherent unfairness of such schemes. An unfair law cannot provide the basis for denial of the right to bring an action against government for compensation resulting from overregulation of private property.

[2] In ***Penn Central Transportation Co. v. City of New York***, 438 U.S. 104, 137 (1978), the Court stated in dicta that such a scheme appeared to provide compensation for an alleged taking. However, in that case, the Court did not directly address the validity of the TDR scheme. ***Id.*** 122 n.24.



For this reason, and the reasons set forth above, amicus respectfully requests that this Court reverse the decision of the court below.

DATED: September 5, 1996.

Respectfully submitted,

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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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BERNADINE SUITUM,

*Petitioner,*

*v.*

TAHOE REGIONAL PLANNING AGENCY,

*Respondent,*

---

**On Petition for Writ of Certiorari to The Ninth Circuit Court of Appeals**

---

## BRIEF OF
## SOUTHEASTERN LEGAL FOUNDATION
## AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

---

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September, 1996

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1996**

---

BERNADINE SUITUM,

*Petitioner*,

*v.*

TAHOE REGIONAL PLANNING AGENCY,

*Respondent*,

---

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

COMES NOW the Southeastern Legal Foundation, Inc., in interest as *amicus curiae*, and petitions this Court for leave to file a brief *amicus curiae* in support of Petitioner's Petition for Writ of Certiorari before this Court.

The consent of the parties has been requested, and such consent has been denied by counsel for Respondent Tahoe Regional Planning Agency, in a letter dated August 27, 1996 to general counsel for the Southeastern Legal Foundation, Inc., which states in part, "It is our position that the filing of an amicus curiae brief on behalf of the

Southeastern Legal Foundation, Inc. will not assist the Court in resolving this matter."

The Southeastern Legal Foundation, Inc. appeared before this Court as *amicus curiae* in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in which this Court finally acknowledged the principle under the fifth amendment to the Constitution of the United States that owners of private property must receive just compensation for the use and enjoyment of their land when a government entity completely destroys through regulation such use and enjoyment.

The Southeastern Legal Foundation, Inc. petitions this Court to grant leave for the submission of a brief *amicus curiae* to highlight application of the Court's decision in *Lucas* to the facts presented in the instant case, and to emphasize the constitutionally fundamental equivalency of private property rights with all other civil rights that define the contours of individual freedom.

This 9th day of September, 1996.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

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BERNADINE SUITUM,

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## BRIEF OF SOUTHEASTERN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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**On Petition for Writ of Certiorari to The Ninth Circuit Court of Appeals**

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## INTEREST OF THE AMICUS

The Southeastern Legal Foundation, Inc. ("Foundation") submits its brief as *amicus curiae* in this case. The Respondents in this case have not consented to the filing of this brief, and the Foundation has moved this Court for leave to file this brief.

The Foundation is a non-profit public interest law firm which advocates limited government, individual economic freedom, private

property rights, and the free enterprise system. The Foundation's function is to engage in litigation in support of these principles, and to oppose government abuse of authority at all levels. In the course of carrying out this mission, the Foundation provides direct legal representation to parties in civil litigation, and files *amicus curiae* briefs in selected cases, where important public policy issues are presented. The Foundation appeared as counsel of record in this Court for the petititoner in *Northeastern Florida Contractors v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297 (1993), and has appeared as *amicus curiae* in numerous cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

As an advocate for individual economic freedom and private property rights, Southeastern presents the views of its supporters who believe that such individual rights should be protected against governmental intrusion. The Foundation believes that the decision of the United States Court of Appeals for the Ninth Circuit in this case constitutes a failure to protect private property rights and a departure from this Court's precedents as enunciated in *Lucas*. The Foundation believes this case provides an opportunity for examination of the extent to which the Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) has been exploited by governments to evade constitutional imperatives.

## STATEMENT OF THE CASE

*Amicus* Foundation adopts the statement of the case contained in the brief of the Petitioner.



## SUMMARY OF THE ARGUMENT

The Tahoe Regional Planning Agency's denial of all practical, probable or even potential use and enjoyment of Mrs. Suitum's parcel of land violates this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in which this Court held that denial of all economically beneficial or productive use of land constitutes a compensible confiscation of private property under the fifth amendment to the Constitution of the United States.

Such denial of all use of private property, even for a short time, creates in a plaintiff a valid and ripe "takings" action regarding the period of time during which the "taking" occurred.

The Ninth Circuit misapplied the "final decision" ripeness doctrine articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985) by finding that Mrs. Suitum's potential "transfer" of development rights constituted a "use" of her property. Furthermore, under *Lucas*, a landowner whose palpable deprivation is one step short of annihilation may yet be entitled to relief based on analysis of the degree of economic impact of the regulation on the claimant and the extent to which such regulation has interfered with distinct investment-backed expectations of the owner.

## ARGUMENT

### I

### THIS COURT SHOULD GRANT PETITION FOR WRIT OF CERTIORARI TO DECIDE IF THE FINAL DECISION DOCTRINE WAS PROPERLY APPLIED TO THE CASE BELOW

In 1972, Bernadine Suitum and her late husband acquired an 18,300 square foot parcel of land located in a developed residential subdivision in Incline Village, Nevada. They planned to use the lot for the simple purpose for which the property had always been appropriate, for which real property thoughout time has been employed, and, in fact, for which lots adjoining theirs had been used and developed for years.

The Tahoe Regional Planning Agency ("TRPA") has determined that Mrs. Suitum cannot develop her lot because the property is, in its estimation, a Stream Environment Zone, upon which no developmental disturbance is allowed by policy. The TRPA denied Mrs. Suitum's 1989 plan to develop a residence on the parcel. Such a denial of all use and enjoyment of her parcel of land clearly requires application of the principles enunciated by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), in which it was held that the denial of all economically beneficial or productive use of land is a compensible confiscation for purposes of the fifth amendment to the Constitution of the United States.



Yet, in a scheme which can at best be described as byzantine, the TRPA has attempted to circumvent the Takings Clause by conjuring for an undeterminable value certain "transferable development rights," or TDRs, which artificially displace the constitutional right to full use and enjoyment of private property -- the right to occupy the entire property, the right to build on that property, and the right to build on the property at a chosen time.

According to TRPA policy, each of these interests may be exercised only upon approval of the TRPA. In the case of Mrs. Suitum, these developmental interests must be "transfered," or sold, in their entirety because the TRPA has forbidden any development on her parcel. Of particular note, the three "property interests" artificially and disingenuously posited by the TRPA do not inhere naturally or logically in any parcel of land subject to TRPA jurisdiction. The Ninth Circuit has, in effect, equated private property rights with the chimerical right to vote in, say, Cuba, where exercise of the franchise turns upon the cheerful absence of choice. We refer to such injustice as a "right without a remedy," a legal lacuna abhorred by the Constitution, especially in matters concerning civil rights, of which private property ownership had been a neglected sibling until *Lucas*.

Despite the fact that the Ninth Circuit, in reviewing the decision of the District Court, found that Mrs. Suitum's development rights on the parcel were identifiable and had value, the court below required Mrs. Suitum to "cash in" on those rights by attempting to transfer them. The TRPA included the clever requirement that she apply for approval for the use of those rights by another landowner, thereby further and permanently severing from any legitimate expectational use and enjoyment the inherent and constitutionally sacrosanct nature of the right of private property ownership.

The holding below is troublesome. The courts below misapply the "final decision" ripeness doctrine espoused by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985) in their denials of jurisdiction. Under *Williamson County*, a property owner does not have a ripe claim that a regulation of private property requires invocation of the Takings Clause until the owner has "obtained a final decision regarding how [she] will be allowed to develop [her] property." 473 U.S. at 190. The TRPA has enjoined Mrs. Suitum and, presumably, any future owner of the parcel of land in question, from development of the particular parcel of land.

Moreover, the TRPA's denial of the use and enjoyment of Mrs. Suitum's parcel of land may more readily be characterized at this juncture as a "temporary taking," in which a landowner is denied "all use of his property, [and such takings] are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Ninth Circuit took notice of this principle in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1334 (9th Cir 1990), *cert. denied*, 499 U.S. 943 (1991), stating in part, "if [an ordinance] . . . effected a taking, even for a short time, plaintiffs are entitled to just compensation for that temporary taking." In a similar case decided by the U.S. District Court for Nevada in 1992, the court held that the TRPA ordinances limiting the number of single-family dwelling permits and prescribing application procedures for same by property owners in the Tahoe basin may effect a "temporary taking," and, therefore, "so far as Plaintiff can allege a temporary taking, even for a very short period of time, she has a valid takings action." *Carpenter v. Tahoe Regional*



*Planning Agency*, 804 F. Supp. 1316, 1321 (D. Nev. 1992). That court held that the Plaintiff had a ripe takings claim for the time period that a challenged ordinance, which created a case-by-case review process for the issuance of dwelling permits somewhat similar to the present case, was in effect. 804 F. Supp. at 1323.

## II

## THIS COURT SHOULD APPLY THE PER SE TAKINGS RULE ESTABLISHED IN *LUCAS* TO THE PRESENT CASE

One of the problems with the Ninth Circuit's ruling in the instant case is that, for purposes of the *Williamson County* final decision ripeness doctrine, the court found that Mrs. Suitum's "transfer" of development rights would be a "use" of her property. This misapplication of the ripeness doctrine conflicts not only with this Court's definition of "use" of land as building on or development of the land itself, *Williamson County*, 473 U.S. at 190, but more importantly undermines this Court's decision in *Lucas* that regulatory denial of all beneficial or productive use of land is a violation of the Takings Clause of the fifth amendment to the Constitution of the United States. *Lucas*, 505 U.S. at 1015.

With regard to the Ninth Circuit's holding in the instant case that Mrs. Suitum's "use" of her property via the potential sale of certain rights derived from a small portion of "transferable" property may provide adequate compensation, it should be pointed out that Justice Scalia has noted

> . . .the fact that regulations that leave the owner of land without economically beneficial or productive options for its use - typically, as here, by requiring land to be left substantially in its natural state - carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

*Lucas*, 505 U.S. at 1011-12. Furthermore, the regulatory "takings" formula identified in *Lucas* should apply to the instant case despite potential "benefits" that Mrs. Suitum might realize upon sale of her TDRs:

> [Such an] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and. . .the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

*Lucas*, 505 U.S. at 1102, n. 8.

Here, the policy enacted by the TRPA, namely, the allocation of TDRs and the unlimited and perpetual governance thereof, has affected dramatically the economic value of Mrs. Suitum's parcel of



land and has interfered extensively with her distinct "investment-backed expectations" regarding the parcel of land. The potential and probably interminable inability of Mrs. Suitum to fulfill the legitimate and constitutionally protected expectation of home development on a parcel of privately owned land located in a residentially developed area, coupled with the illusory nature of the so-called "rights" contrived by, and utterly dependent upon, the discretion of the TRPA, constitutes a deprivation or confiscation of private property that cannot be condoned in this case without tacit endorsement of legislative ledgerdemaine. Such an endorsement is a clear abrogation of the dictate enshrined in *Lucas* and ensconced in our Constitution. As this Court has recognized, "The right to enjoy property . . . is, in truth, a 'personal' right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Deprivation of the right to enjoy property, whether through physical interference or regulatory machination, inflicts injury at the very moment of imposition, and should be redressed by this Court.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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September, 1996

Supreme Court, U.S.
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In the

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## JOINT APPENDIX

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| 04/01/96 | Opinion, U. S. C. A. 9 | 154-64 |
| 05/13/96 | Order, U. S. C. A. 9 denying the Petition for Rehearing | 165 |

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

*Bernadine Suitum v. Tahoe Regional Planning Agency*
United States District Court, District of Nevada
Docket No. CV-N-91-040-ECR

| DATE | TITLE |
|---|---|
| January 28, 1991 | Complaint [CR 1] |
| July 22, 1991 | Answer to Complaint [CR 19] |
| September 16, 1992 | First Amended Complaint [CR 36] |
| September 15, 1993 | Defendant's Motion for Summary Judgment [CR 66] |
| October 6, 1993 | Opposition to Defendant's Motion for Summary Judgment [CR 68] |
| October 18, 1993 | Reply to Opposition to Motion for Summary Judgment [CR 69] |
| November 23, 1993 | Order directing parties to file concurrent briefs on issue of transfer of development rights [CR 71] |
| December 8, 1993 | Plaintiff's Brief on Issue of Transfer of Development Rights [CR 73] |



| DATE | TITLE |
|---|---|
| December 8, 1993 | Defendant TRPA's Memorandum Concerning Its Transfer of Development Program [CR 74] |
| December 20, 1993 | Defendant's Reply to Plaintiff's Brief on Issue of Transfer of Development Rights [CR 75] |
| January 7, 1974 | Plaintiff's Response to TRPA's Memorandum Concerning Its Transfer of Development Program [CR 77] |
| January 12, 1994 | [TRPA's] Motion for Leave to File Supplemental Brief Concerning Transfer of Development Rights [CR 81] |
| January 14, 1994 | Minute Order granting Defendant's Motion to File Supplemental Brief [CR 80] |
| January 19, 1994 | Declaration of Paul Kaleta in Support of Plaintiff's Response to TRPA's Memorandum Concerning Its Transfer of Development Program [CR 82] |
| March 25, 1994 | [TRPA's] Supplemental Brief in Response to Affidavit of Paul Kaleta [CR 88] |

| DATE | TITLE |
|---|---|
| March 25, 1994 | Affidavit of Susan E. Scholley in Support of Motion for Summary Judgment [CR 89] |
| March 25, 1994 | Supplemental Affidavit of Stephen R. Johnson in Support of Motion for Summary Judgment [CR 90] |
| March 30, 1994 | Order Granting Defendant's Motion for Summary Judgment on All Claims [CR 91] |
| March 30, 1994 | Judgment Granting Defendant's Motion for Summary Judgment on All Claims [CR 92] |
| April 21, 1994 | Notice of Appeal [CR 93] |

*Bernadine Suitum v. TRPA*
United States Court of Appeals for the Ninth Circuit
Docket No. 94-15768

| | |
|---|---|
| June 24, 1994 | Appellant's Opening Brief |
| July 27, 1994 | Answering Brief of Respondent TRPA |
| August 10, 1994 | Reply Brief of Appellant |
| April 1, 1996 | Opinion |




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Attorneys for Plaintiff

**FILED 1/28/91**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | | |
|---|---|---|
| BERNADINE SUITUM, | ) | Case No. CV-N-91-040- HDM |
| | ) | |
| | ) | COMPLAINT |
| Plaintiff, | ) | |
| vs. | ) | |
| TAHOE REGIONAL PLANNING AGENCY, STATE OF NEVADA, STATE OF CALIFORNIA, and the COUNTY OF WASHOE, A Political Subdivision of the STATE OF NEVADA, | ) | |
| Defendants. | ) | |

Plaintiff, BERNADINE SUITUM, as and for a claim for relief against the above-named Defendants, alleges as follows:

I

JURISDICTION

1. This is an action claiming the invalidity of certain ordinances and regulations adopted by the TAHOE REGIONAL PLANNING AGENCY ("TRPA") and the invalidity of certain actions taken by the TRPA pursuant thereto or, in the alternative, that said regulations and actions constitute an improper taking of the Plaintiff's property and are in violation of Plaintiff's civil rights. Jurisdiction is based on 28 U.S.C. 1331, with Federal Questions arising under the Tahoe Regional Planning Compact between California and Nevada, Pub.L.No. 91-148, 83 Stat. 360 (1969), Amended, Pub.L. 96-551, 94 Stat. 3233; N.R.S. § 277.190 et seq., and the Fifth and Fourteenth Amendments of the United States Constitution. Jurisdiction is also based on 28 U.S.C. 1343, in that Plaintiff claims that Defendant's acts are in violation of her civil rights as provided in 42 U.S.C. 1983.

II

GENERAL ALLEGATIONS

2. In 1972, the Plaintiff acquired a residential subdivision lot identified as Lot 15, Block K, Washoe County Assessor's Parcel No. 130-211-30, in the Mill Creek Subdivision located in Incline Village, Washoe County, Nevada (hereinafter referred to as "Subject Lot"). Since that time, it has been and continues to be the intent and purpose of the Plaintiff to construct a single-family residence on the Subject Lot. Due to a variety of circumstances, including an unfortunate illness and subsequent death of her husband, the Plaintiff was not in a position to undertake the construction of a home on the Subject Lot until very recently. Because of the action taken by Defendant TAHOE REGIONAL PLANNING AGENCY (hereinafter referred to as "TRPA"), as more fully described below, the Plaintiff has been denied that right.

3. Since 1972, the Plaintiff has paid all taxes and assessments for the Subject Lot, including utility fees and public improvement assessments. The Mill Creek Subdivision is substantially built out. The Subject Lot is one of the few undeveloped lots within the subdivision. The Subject Lot is surrounded on three (3) sides by existing houses and on the fourth side by an improved street containing all utilities to service the Subject Lot.



4. The TRPA has adopted an Individual parcel Evaluation System ("IPES") which was implemented in 1989. Prior to the adoption of IPES, the Subject Lot had been classified as land Capability No. 6 which would allow for the construction of a residence.

5. In 1989, Plaintiff applied for and received a Residential Allocation from the COUNTY OF WASHOE for the construction of a house on the Subject Lot. Subsequent to obtaining the Residential Allocation and in accordance with the terms thereof, Plaintiff attempted to submit building plans for a single-family detached dwelling unit to the TRPA for approval. After submitting these building plans, the TRPA conducted a field verification, the results of which designated the Subject Lot as being located in a Stream Environment Zone ("SEZ") which prohibited the construction of a single-family residence. The TRPA also conducted an IPES review of the Subject Lot. The IPES score for the Subject Lot as determined by the TRPA was zero (0) which under the TRPA's Ordinances prohibits the construction of a single-family residence or any other use of the Subject Lot.

6. Plaintiff appealed the field verification which classified the Subject Lot as "SEZ" and the IPES score of ) to the TRPA. These appeals were combined into a single appeal process. This appeal was heard by the TRPA initially on August 22, 1990, and subsequently on November 27, 1990. At that time, the TRPA acted to deny the Plaintiff's appeal and upheld the IPES score on the grounds that the Subject Lot was located in a Stream Environment Zone. The effect of the determination of the TRPA was to deny the Plaintiff the right to construct a home on the Subject Lot, thereby depriving her of all reasonable and economically viable use of the Subject Lot.

7. The TRPA was created by the States of Nevada and California and acts under the authority granted to the TRPA by those States. The States of California and Nevada have delegated regulatory powers, including the police power of land use regulation of private property, to the TRPA for lands located within the Tahoe Basin. In addition, Nevada and California provide the funding for the operation and maintenance of the

TRPA. The States of Nevada and California are responsible for the actions of the TRPA.

8. Plaintiff has exhausted all reasonably available administrative remedies.

9. It has been necessary for the Plaintiff to retain counsel for the prosecution of this matter and in addition to all other relief requested hereunder the Plaintiff is entitled to an award of reasonable attorneys' fees.

III

FIRST CLAIM FOR RELIEF

10. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

11. The action taken by the TRPA in denying Plaintiff the right to construct a residence of the Subject Lot is arbitrary, capricious, unlawful and does not protect any legitimate public interest and is, therefore, and improper exercise of police power.

12. The action taken by the TRPA with respect to the Subject Lot should be declared invalid, and the TRPA should be ordered to allow Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

IV

SECOND CLAIM FOR RELIEF

13. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

14. The action taken by the TRPA as applied to Plaintiff and the Subject Lot is unconstitutional in violation of the Fifth and Fourteenth Amendments of the United States Constitution and should thereby be declared invalid.

V

THIRD CLAIM FOR RELIEF

15. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

16. The action taken by the TRPA constitutes a taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution for which Plaintiff is entitled to just compensation in excess of $50,000.



VI

FOURTH CLAIM FOR RELIEF

17. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

18. The action taken by the TRPA was taken under the color of state law of the States of California and Nevada and the TRPA Compact and deprived the Plaintiff of her rights, privileges and immunities secured by the Constitution of the United States, and as a result thereof, Defendants and each of them are liable to Plaintiff for damages in excess of $50,000.

VII

FIFTH CLAIM FOR RELIEF

19. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

20. Since acquiring the Subject Lot in 1972, Plaintiff has paid property taxes and special assessments to Defendant, WASHOE COUNTY. Because Plaintiff has been denied the use of her property, Plaintiff and the Subject Lot have been denied the benefits to be derived from the payments of assessments and taxes.

21. Plaintiff is entitled to reimbursement of all taxes and special assessments paid to Defendants, WASHOE COUNTY, the STATE OF NEVADA and the TRPA.

WHEREFORE, Plaintiff prays for relief as follows:

1. That the Court declare that the action taken by the TRPA denying the Plaintiff the right to build on the Subject Lot is invalid and unlawful.

2. That the TRPA be ordered to permit Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

3. That the Plaintiff be awarded damages for the taking of her property without due process of law, including damages for the fair market value of the Subject Lot taken and all taxes and assessments that have been paid thereon.

4. That the Plaintiff be awarded damaged in excess of $50,000 for the deprivation by Defendants of Plaintiff's rights,

privileges and immunities secured by the Constitution of the United States.

5. For all costs of suit and reasonable attorneys' fees.

6. For such other and further relief as the Court deems just and appropriate.

DATED this 28th day of January, 1991.

McDONALD, CARANO, WILSON,
McCUNE, BERGIN, FRANKOVICH &
HICKS

By /S/ JOHN FRANKOVICH
JOHN FRANKOVICH

Attorneys for Plaintiff

(Certificate of Service omitted in printing.)



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**Filed 7/22/91**

Attorneys for Defendant
Tahoe Regional Planning Agency

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | |
|---|---|
| BERNADINE SUITUM<br><br>Plaintiff,<br><br>vs.<br><br>TAHOE REGIONAL PLANNING AGENCY, STATE OF NEVADA, STATE OF CALIFORNIA, and the COUNTY OF WASHOE, a Political Subdivision of the STATE OF NEVADA,<br><br>Defendants. | Case No. **CV-N-91-040-HDM**<br><br>ANSWER TO COMPLAINT |

Defendant, Tahoe Regional Planning Agency (TRPA), in answer to plaintiff's complaint herein, dated January 28, 1991, admits, denies and alleges as follows:

ANSWER TO GENERAL ALLEGATIONS

1. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1, 3, 7 and 9, and for that reason, denies each and every allegation contained in said paragraphs.

2. Defendant denies each and every allegation contained in paragraph 8.

3. Answering paragraph 2, defendant denies the final sentence of said paragraph, set forth at lines 22-24 of page 2 of the complaint. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 2, and for that reason, denies each and every of said remaining allegations.

4. Answering paragraph 4, defendant admits the TRPA has adopted an Individual Parcel Evaluation System (IPES) which was implemented in 1989. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 4, and for that reason, denies each and every of said remaining allegations.

5. Answering paragraph 5, defendant admits the Subject Lot is located in a Stream Environment Zone ("SEZ") and that the IPES score for the Subject Lot as determined by the TRPA was zero (0). Further answering said paragraph 5, defendant denies the clause of said paragraph set forth at lines 17-18 of page 3 of the complaint which reads, "which prohibited the construction of a single-family residence." Further answering said paragraph 5, defendant denies the clause of said paragraph set forth at lines 20-22 of page 3 of the complaint which reads, "which under the TRPA's Ordinances prohibits the construction of a single-family residence or any other use of the Subject Lot." Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 5, and for that reason, denies each and every of said remaining allegations.

6. Answering paragraph 6, defendant admits plaintiff appealed the IPES score of zero to the TRPA and that this appeal was heard by the TRPA initially on August 22, 1990, and subsequently on November 29, 1990, and further admits that at that latter time, the TRPA acted to deny the plaintiff's appeal and upheld the IPES score on the grounds that the Subject Lot was located in a Stream Environment Zone. Defendant denies the allegations contained in the last sentence of said paragraph 6, set forth at lines 1-5 of page 4 of the complaint. Defendant lacks knowledge or information sufficient to form a belief as to the truth



of the remaining allegations of said paragraph 6, and for that reason, denies each and every of said remaining allegations.

ANSWER TO FIRST CLAIM FOR RELIEF

7. Answering paragraph 10, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraph 2 through 9, inclusive, of the complaint.

8. Defendant denies the allegations contained in paragraphs 11 and 12.

ANSWER TO SECOND CLAIM FOR RELIEF

9. Answering paragraph 13, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

10. Defendant denies the allegations contained in paragraph 14.

ANSWER TO THIRD CLAIM FOR RELIEF

11. Answering paragraph 15, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

12. Defendant denies the allegations contained in paragraph 16.

ANSWER TO FOURTH CLAIM FOR RELIEF

13. Answering paragraph 17, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

14. Defendant denies the allegations contained in paragraph 18.

ANSWER TO FIFTH CLAIM FOR RELIEF

15. Answering paragraph 19, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

16. Answering paragraph 20, defendant denies the allegations contained in the last sentence of said paragraph set forth at lines 9-11 of page 6 of the complaint. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 20, and for that reason, denies each and every of said remaining allegations.

17. Answering paragraph 21, defendant denies plaintiff is entitled to reimbursement from TRPA of any taxes, special assessments or of any other sums whatsoever and further denies that plaintiff paid any taxes, special assessments or any other similar sums to TRPA. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 21, and for that reason, denies each and every of said remaining allegations.

AFFIRMATIVE DEFENSES

As and for separate affirmative defenses, defendant alleges:

FIRST AFFIRMATIVE DEFENSE

18. Each claim for relief of plaintiff's complaint fails to state a claim upon which relief can be granted as to this answering defendant.

SECOND AFFIRMATIVE DEFENSE

19. Plaintiff has failed to exhaust available administrative remedies.

THIRD AFFIRMATIVE DEFENSE

20. Plaintiff's complaint fails to state an actual, justiciable controversy as to this answering defendant.

FOURTH AFFIRMATIVE DEFENSE

21. Plaintiff is not an aggrieved person as required by Article VI(j) of the Tahoe Regional Planning Compact.

FIFTH AFFIRMATIVE DEFENSE

22. This Court lacks jurisdiction because plaintiff's complaint is not ripe for adjudication.

SIXTH AFFIRMATIVE DEFENSE

23. Plaintiff's complaint as to this answering defendant is not ripe, and this Court thus lacks jurisdiction, because of plaintiff's failure to obtain a final decision by TRPA as to the amount of development or other uses of plaintiff's property that may be allowed by the Tahoe Regional Planning Compact and TRPA's Regional Plan and Ordinances.



SEVENTH AFFIRMATIVE DEFENSE

24. Plaintiff has waived and therefore may not assert each purported claim for relief in her complaint.

EIGHTH AFFIRMATIVE DEFENSE

25. This answering defendant is not liable or otherwise responsible for the conduct or obligations of other defendants in this action.

NINTH AFFIRMATIVE DEFENSE

26. Each claim for relief of plaintiff's complaint is time-barred as having been brought beyond the applicable statute of limitations.

TENTH AFFIRMATIVE DEFENSE

27. Each purported claim for relief of plaintiff's complaint is barred by laches or estoppel or both of them.

ELEVENTH AFFIRMATIVE DEFENSE

28. A cause of action for recovery of taxes, assessments or other fees paid to the County of Washoe, Nevada, the State of Nevada or any other entity does not lie against TRPA because TRPA did not collect or otherwise receive payment form plaintiff of any such taxes, assessments or other fees.

TWELFTH AFFIRMATIVE DEFENSE

29. TRPA cannot be ordered to allow construction of a single-family residence or any other project on the Subject Lot in the event that construction thereof is in violation of a lawful regulation of TRPA.

THIRTEENTH AFFIRMATIVE DEFENSE

30. Each claim for relief of plaintiff's complaint fails to present a concrete controversy ripe for adjudication.

WHEREFORE, this answering defendant prays that:

1. Plaintiff's complaint herein be dismissed with prejudice;

2. Plaintiff take nothing by this action;

3. Defendant recover its costs of suit and attorney's fees in this action; and

4. The Court award such other and further relief as it deems appropriate.

DATED: July 22, 1991.

Crowell, Susich, Owen, & Tackes

By: /s/Gary A. Owen
Gary A. Owen

Attorneys for Defendant
Tahoe Regional Planning Agency

(Certificate of Service by Mail omitted in printing.)



WM. PATTERSON CASHILL, ESQ.
First Floor
290 South Arlington Avenue
Reno, Nevada 89501
Telephone: (702) 323-3194

Attorney for Plaintiff

**Filed 9/16/92**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | | |
|---|---|---|
| BERNADINE SUITUM, | ) | Case No. |
| | ) | CV-N-91-040-ECR |
| Plaintiff, | ) | |
| | ) | **FIRST AMENDED** |
| vs. | ) | **COMPLAINT** |
| | ) | |
| TAHOE REGIONAL PLANNING AGENCY, STATE OF NEVADA | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

Plaintiff, BERNADINE SUITUM, as and for a claim for relief against the above-named Defendants, alleges as follows:

I

JURISDICTION

1. This is an action claiming the invalidity of certain ordinances and regulations adopted by the TAHOE REGIONAL PLANNING AGENCY ("TRPA") and the invalidity of certain actions taken by the TRPA pursuant thereto or, in the alternative, that said regulations and actions constitute an improper taking of the Plaintiff's property and are in violation of Plaintiff's civil rights. Jurisdiction is based on 28 U.S.C. 1331, with Federal Questions arising under the Tahoe Regional Planning Compact

between California and Nevada, Pub.L.No. 91-148, 83 Stat. 360 (1969), Amended, Pub.L. 96-551, 94 Stat. 3233; N.R.S. § 277.190 et seq., and the Fifth and Fourteenth Amendments of the United States Constitution. Jurisdiction is also based on 28 U.S.C. 1343, in that Plaintiff claims that Defendant's acts are in violation of her civil rights as provided in 42 U.S.C. 1983.

II

GENERAL ALLEGATIONS

2. In 1972, the Plaintiff Acquired a residential subdivision lot identified as Lot 15, Block K, Washoe County Assessor's Parcel No. 130-211-31, in the Mill Creek Subdivision located in Incline Village, Washoe County, Nevada (hereinafter referred to as "Subject Lot"). Since that time, it has been and continues to be the intent and purpose of the Plaintiff to construct a single-family residence on the Subject Lot. Due to a variety of circumstances, including an unfortunate illness and subsequent death of her husband, the Plaintiff was not in a position to undertake the construction of a home on the Subject Lot until very recently. Because of the action taken by Defendant TAHOE REGIONAL PLANNING AGENCY (hereinafter referred to as "TRPA"), as more fully described below, the Plaintiff has been denied that right.

3. Since 1972, the Plaintiff has paid all taxes and assessments for the Subject Lot, including utility fees and public improvement assessments. The Mill Creek Subdivision is substantially built out. The Subject Lot is one of the few undeveloped lots within the subdivision. The Subject Lot is surrounded on three (3) sides by existing houses and on the fourth side by an improved street containing all utilities to service the Subject Lot.

4. The TRPA has adopted an Individual Parcel Evaluation System ("IPES") which was implemented in 1989. Prior to the adoption of IPES, the Subject Lot had been classified as Land Capability No. 6 which would allow for the construction of a residence.

5. In 1989, Plaintiff applied for and received a Residential Allocation from the COUNTY OF WASHOE for the construction of a house on the Subject Lot. Subsequent to obtaining the



Residential Allocation and in accordance with the terms thereof, Plaintiff attempted to submit building plans for a single-family detached dwelling unit to the TRPA for approval. After submitting these building plans the TRPA conducted a field verification, the results of which designated the Subject Lot as being located in a Stream Environment Zone ("SEZ") which prohibited the construction of a single-family residence. The TRPA also conducted an IPES review of the Subject Lot. The IPES score for the Subject Lot as determined by the TRPA was zero (0) which under the TRPA's Ordinances prohibits the construction of a single-family residence or any other use of the Subject Lot.

6. Plaintiff appealed the field verification which classified the Subject Lot as "SEZ" and the IPES score of 0 to the TRPA. These appeals were combined into a single appeal process. This appeal was heard by the TRPA initially on August 22, 1990, and subsequently on November 27, 1990. At that time, the TRPA acted to deny the Plaintiff's appeal and upheld the IPES score on the grounds that the Subject Lot was located in a Stream Environment Zone. The effect of the determination of the TRPA was to deny the Plaintiff the right to construct a home on the Subject Lot, thereby depriving her of all reasonable and economically viable use of the Subject Lot.

7. The TRPA was created by the States of Nevada and California and acts under the authority granted to the TRPA by those States. The States of California and Nevada have delegated regulatory powers, including the police power of land use regulation of private property, to the TRPA for lands located within the Tahoe Basin. In addition, Nevada and California provide the funding for the operation and maintenance of the TRPA. The States of Nevada and California are responsible for the actions of the TRPA.

8. Plaintiff has exhausted all reasonable available administrative remedies.

9. It has been necessary for the Plaintiff to retain counsel for the prosecution of this matter and in addition to all other relief requested hereunder the Plaintiff is entitled to an award of reasonable attorneys' fees.

III

FIRST CLAIM FOR RELIEF

10. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

11. The action taken by the TRPA in denying Plaintiff the right to construct a residence of the Subject Lot is arbitrary, capricious, unlawful and does not protect any legitimate public interest and is, therefore, an improper exercise of police power.

12. The action taken by the TRPA with respect to the Subject Lot should be declared invalid, and the TRPA should be ordered to allow Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

IV

SECOND CLAIM FOR RELIEF

13. Plaintiff incorporates by reference all of the general allegations set forth in Paragraphs 2 through 9.

14. The action taken by the TRPA as applied to Plaintiff and the Subject Lot is unconstitutional in violation of the Fifth and Fourteenth Amendments of the United States Constitution and should thereby be declared invalid.

V

THIRD CLAIM FOR RELIEF

15. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

16. The action taken by the TRPA constitutes a taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution for which Plaintiff is entitled to just compensation in excess of $50,000.

VI

FOURTH CLAIM FOR RELIEF

17. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

18. The action taken by the TRPA was under the color of state law of the States of California and Nevada and the TRPA Compact and deprived the Plaintiff of her rights, privileges and



immunities secured by the Constitution of the United States, and as a result thereof, Defendants and each of them are liable to Plaintiff for damages in excess of $50,000.

VII

FIFTH CLAIM FOR RELIEF

19. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

20. Since acquiring the Subject Lot in 1972, Plaintiff has paid property taxes and special assessments to Defendant, WASHOE COUNTY. Because Plaintiff has been denied the use of here property, Plaintiff and the Subject Lot have been denied the benefits to be derived from the payments of assessments and taxes.

21. Plaintiff is entitled to reimbursement of all taxes and special assessment paid to Defendants, WASHOE COUNTY, the STATE OF NEVADA and the TRPA.

WHEREFORE, Plaintiff prays for relief as follows;

1. That the Court declare that the action taken by the TRPA denying the Plaintiff the right to build on the Subject Lot is invalid and unlawful.

2. That the TRPA be ordered to permit Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

3. That the Plaintiff be awarded damages for the taking of her property without due process of law, including damages for the fair market value of the Subject lot taken and all taxes and assessments that have been paid thereon.

4. That the Plaintiff be awarded damages in excess of $50,000 for the deprivation by Defendants of Plaintiff's rights, privileges and immunities secured by the Constitution of the United States.

5. For all costs of suit and reasonable attorneys' fees.

6. For such other and further relief as the Court deems just and appropriate.

DATED this 9th day of September, 1992.

/S/WM. PATTERSON CASHILL
WM. PATTERSON CASHILL, ESQ.

Attorney for Plaintiff

(Certificate of Service by Mail omitted in printing.)



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(702) 882-1311

Attorneys for Defendant
Tahoe Regional Planning Agency

**Filed 9/15/93**

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

| | |
|---|---|
| BERNADINE SUITUM,<br><br>Plaintiff,<br><br>v.<br><br>TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA,<br><br>Defendants. | **CASE NO. CV-N-91-040-ECR**<br><br>AFFIDAVIT OF SUSAN E. SCHOLLEY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT |

STATE OF NEVADA )
) ss.
CARSON CITY )

Susan E. Scholley, being first duly sworn, on oath and under penalty of perjury, deposes and says:

1. I am the Special Projects Attorney of defendant Tahoe Regional Planning Agency (TRPA). In that capacity, I am a member of the TRPA staff. I have personal knowledge of the matters hereinafter stated and could competently testify to same if called as a witness for that purpose.

2. I have reviewed, and am familiar with, TRPA environmental and planning documents pertaining to TRPA's 1984 Plan and 1987 Plan. Those documents include, but are not limited to, the Environmental Impact Statement for the 1984 and 1987. Plans, the Goals and Policies for the 1987 Plan and the TRPA Code of Ordinances implementing the 1987 Plan.

3. I have also reviewed, and am familiar with, all TRPA administrative files and records pertaining to plaintiff Bernadine Suitum.

4. Attached hereto and incorporated herein by this reference, as exhibits to this Affidavit, are true and correct copies of the following documents, which documents are public records of the TRPA and bear the following respective exhibit letters:

**EXHIBIT A** -- Pages 75, 76 and 77 of the document entitled, "Environmental Impact Statement For Adoption of A Regional Plan For The Lake Tahoe Basin, Tahoe Regional Planning Agency, February 1983 ";

**EXHIBIT B** -- Pages IV-23 through IV-25, VII-3 through VII-8, and VII-14 through VII-17 of the document entitled, "Regional Plan For The Lake Tahoe Basin, Goals And Policies, Tahoe Regional Planning Agency, September 17, 1986";

**EXHIBIT C** -- Excerpts of Chapter 20 (pp . 20-8 through 20-27), Chapter 34 (pp. 34-1 through 34-6), and Chapter 37 (pp. 37-9 through 37-16) of the document entitled "Regional Plan For The Lake Tahoe Basin, Code of Ordinances And Rules of Procedure, Tahoe Regional Planning Agency".

5. I have reviewed TRPA's administrative files and records concerning Plaintiff Bernadine Suitum, and said files and records contain no application to TRPA by Mrs. Suitum to transfer either a residential development right or a residential allocation pursuant to Chapter 34 of the TRPA Code of Ordinances or an application to transfer land coverage pursuant to Chapter 20 of the Code of Ordinances.



6. TRPA has never levied or collected from Plaintiff Bernadine Suitum or any other owner of real property within the Lake Tahoe Basin special assessments or taxes for purposes of public improvements within the Basin.

Executed at Carson City, Nevada, on September 9, 1993.

/s/ Susan E. Scholley
Susan E. Scholley,
Special Projects Attorney

Subscribed and Sworn to Before me
this 9th day of September, 1993.

/s/ LAUREN ARENDS
Notary Public

(Certificate of Service by Mail omitted on printing.)

## EXHIBIT A TO SCHOLLEY AFFIDAVIT

### STREAM ENVIRONMENT ZONES

Stream environment zones comprise only a small portion of the Basin but they perform a variety of natural functions critical to the needs of wildlife, the maintenance of water quality, and others. The role of SEZ's in the cleansing of runoff is integral to the achievement of regional water quality goals and standards.

### CURRENT SITUATION

The stream environment and related hydrologic zone is the area directly influenced by and including the presence of streams or near surface groundwater. The stream environment zone (SEZ) is delineated by the presence of meadows, marshes, water courses, drainage ways, and flood plains and riparian vegetation or a buffer strip parallel to the stream course which maintains the integrity and hydrologic function of the SEZ. The buffer is based on the stream order with the largest streams having a 100' buffer, smaller streams with 50', and minor streams having 25' buffers.

The riparian vegetation associated with SEZ's provides critical wildlife habitat throughout the Tahoe Basin. The edge effect created by the riparian vegetation and the coniferous forest is especially critical to wildlife. The SEZ's also enhance visual quality in the Basin. The soils of the SEZ are generally very productive and support a wide diversity of plant species. The riparian vegetation of the SEZ is important for many other reasons in the Tahoe Basin including treatment of runoff and maintenance of soil stability.

SEZ's are capable of conveying both surface and subsurface runoff to Lake Tahoe while removing nutrients and sediments. The capacity of a restored SEZ to treat surface runoff is shown in Table 8. A study by the U.S. Environmental Protection Agency (1980) found that SEZ's in the Tahoe Basin are effective for removing nutrients and sediments from surface runoff. Preliminary data from the U.S. Forest Service watershed restoration project at the Jennings Casino site support this information.

Table 8. Effectiveness of watershed restoration at the Jennings Casino Site.[a]



| Station | Suspended Solids mg/l n[b] | Suspended Solids mg/l $\bar{x}$[c] | Total nitrogen as N mg/l n | Total nitrogen as N mg/l $\bar{x}$ | Phosphate as P mg/l n | Phosphate as P mg/l $\bar{x}$ | Iron mg/l n | Iron mg/l $\bar{x}$ |
|---|---|---|---|---|---|---|---|---|
| Above | 30 | 493 | 18 | 1.424 | 28 | 0.982 | 20 | 1.060 |
| Midway | 8 | 162 | 8 | 0.300 | 8 | 0.019 | 8 | 0.706 |
| Below | 20 | 29 | 10 | 0.395 | 18 | 0.141 | 16 | 0.300 |
| Percent reduction in concentration | | 94 | | 73 | | 86 | | 72 |

[a] Source: TRPA, 1977.
[b] n = number of samples
[c] $\bar{x}$ = average value

### RELATIONSHIPS TO THRESHOLDS

Stream environment zones are 'valuable' in the sense of their ability to cleanse runoff, provide wildlife habitat, enhance scenic quality, and protect the soil resource. Because of these and other qualities, an environmental threshold was established for SEZ's. The threshold is basically a nondegradation standard that also includes provisions for restoring disturbed SEZ's.

### MANAGEMENT DIRECTION

The Tahoe Regional Planning Agency is the lead Agency for water quality planning in the Basin. The Lake Tahoe Water Quality Management Plan is implemented through TRPA Ordinance No. 81-5. Section 13.10 of that ordinance states that . . . "no person shall perform any grading, clearing, removal of vegetation, filling, or creation of land coverage, within or upon a stream environment zone ("SEZ"), as described or depicted upon maps contained in the Plan."

### LIMITATIONS AND POTENTIAL

Stream Environment Zones have been significantly disturbed, altered, or modified since the 1960's. Less than 7% of the total land area in the Basin is now made-up of riparian

vegetation. Recent figures show that there are 17,718 acres of SEZ and of that total, 2,466 acres have been built on or disturbed in some manner. Potential for restoration is likely less than 1,483 acres.

## CULTURAL

For the purposes of this document, cultural refers to historical and archaeological aspects of the region.

### CURRENT SITUATION

The Lake Tahoe region was first inhabited by small groups of Washoe Indians who wandered in summer along traditional routes in search of food, returning occasionally to small encampments along eastward flowing streams.

The earliest written description of the Washoe Tribe's contact with U.S. explorers was made by John C. Fremont in his expedition notes of January 24, 1844. Twenty-one days later, February 14, 1844, Fremont also recorded the earliest sighting of Lake Tahoe by a U.S. explorer.

Early permanent settlement in the Tahoe Basin was sparse until 1859, when the Comstock mining activities in Nevada started a boom along the "Bonanza Road" from California. Trading posts, way stations, inns, fishing boat-, dairy farms, ranching headquarters and lumber operations all played an essential role in Lake Tahoe's development. For the remainder of the century, mountain men, ranchers, immigrants, steamer captains, cowboys, innkeepers, commercial fishermen, loggers and scores of other struggled to carve out an existence.

From the late 1880's, and for the next 50 years, the Lake Tahoe region served as a recreational playground for the well-to-do. The pace of development along the lakeshore was slow, with only a few large estates and several family oriented resorts. The pattern of subdivision and development of Tahoe land began shortly after World War II, when large numbers of vacationers with more leisure time came to this area because of its scenic beauty, outdoor recreation, and gambling. The combination of these three features provided a wide range of recreational opportunities within easy distance of growing population centers. The ski industry emerged in the mid-1950's and made Lake Tahoe one of America's all-year playgrounds.



## EXHIBIT B TO SCHOLLEY AFFIDAVIT

## STREAM ENVIRONMENT ZONE

Stream environment zones (SEZs) and related hydrologic zones consist of the natural marsh and meadowlands, watercourses and drainage ways, and floodplains which provide surface water conveyance from upland areas into Lake Tahoe and its tributaries. Stream environment zones are determined by the presence of riparian vegetation, alluvial soil, minimum buffer strips, water influence areas, and floodplains. The plant associations of stream environment zones constitute only a small portion of the Basin's total land area, but are perhaps the single most valuable plant communities in terms of their role in providing for wildlife habitat, purification of water, and scenic enjoyment. Protection and restoration of stream environment zones are essential for improving and maintaining the environmental amenities of the Lake Tahoe Basin and for achieving environmental thresholds for water quality, vegetation preservation, and soil conservation.

GOAL #1 PROVIDE FOR THE LONG-TERM PRESERVATION AND RESTORATION OF STREAM ENVIRONMENT ZONES.

The preservation of SEZs is a means for achieving numerous environmental thresholds. Policies that promote their maintenance, protection, and restoration are listed below.

### POLICIES

1. RESTORE ALL DISTURBED STREAM ENVIRONMENT ZONE LANDS IN UNDEVELOPED, UNSUBDIVIDED LANDS, AND RESTORE 25 PERCENT OF THE SEZ LANDS THAT HAVE BEEN DISTURBED, DEVELOPED, OR SUBDIVIDED.

   Many acres of SEZ lands have been modified or disturbed. TRPA shall identify the number of acres to be restored and prepare a list of projects to achieve the environmental threshold carrying capacity for stream environment zones. TRPA shall develop an implementation program to restore the necessary acreage, and establish an annual tracking program. The implementation on program shall provide for restoration

over a twenty year period, with 90 percent of the acreage to be restored within the first fifteen years.

2. SEZ LANDS SHALL BE PROTECTED AND MANAGED FOR THEIR NATURAL VALUES.

   SEZ lands and associated riparian vegetation are scarce in the Basin relative to other plant communities. Because SEZs provide many beneficial functions (especially pertaining to water quality) only forest management practices, stream improvement programs, and habitat restoration projects are permissible uses.

3. GROUND WATER DEVELOPMENT IN SEZ LANDS SHALL BE DISCOURAGED WHEN SUCH DEVELOPMENT COULD POSSIBLY IMPACT ASSOCIATED PLANT COMMUNITIES OR INSTREAM FLOWS.

   Withdrawal of water from SEZ lands may lower surface and ground waters and, by so doing, alter plant composition of the riparian vegetation and reduce instream flows. Groundwater proposals in SEZs and riparian plant communities will be evaluated against those concerns.

4. GOLF COURSES IN STREAM ENVIRONMENT ZONES SHALL BE ENCOURAGED TO RETROFIT COURSE DESIGN IN COMBINATION WITH FERTILIZER APPLICATION STANDARDS (SEE WATER QUALITY SUBELEMENT, GOAL #1 POLICY 5) TO PREVENT RELEASE OF NUTRIENTS TO ADJOINING GROUND AND SURFACE WATERS.

   A combination of strategies to include fertilizer application standards and course redesign may be necessary to control off-site nutrient release from golf course fairways and greens.

5. NO NEW LAND COVERAGE OR OTHER PERMANENT LAND DISTURBANCE SHALL BE PERMITTED IN STREAM ENVIRONMENT ZONES EXCEPT FOR THOSE USES AS NOTED IN A, B, C, D, AND E BELOW:

   A. PUBLIC OUTDOOR RECREATION FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS A NECESSARY PART OF A PUBLIC AGENCY'S LONG RANGE PLANS FOR PUBLIC OUTDOOR



RECREATION, (2) THE PROJECT IS CONSISTENT WITH THE RECREATION ELEMENT OF THE REGIONAL PLAN; (3) THE PROJECT, BY ITS VERY NATURE, MUST BE SITED IN A STREAM ENVIRONMENT ZONE; (4) THERE IS NO FEASIBLE ALTERNATIVE WHICH WOULD REDUCE THE EXTENT OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES; (5) THE IMPACTS ARE FULLY MITIGATED; (6) STREAM ENVIRONMENT ZONE LANDS ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF STREAM ENVIRONMENT ZONE WHICH IS DISTURBED OR DROOPED BY THE PROJECT.

To the fullest extent possible, recreation facilities must be sited outside of stream environment zones. Some recreation facilities, such ma river access points or stream crossings for hiking trails, by their very nature require some encroachment of stream environment zones. However, the six-part test established by this policy allows encroachment of SEZs where such encroachment is essential for public outdoor recreation and precautions are taken to ensure that stream environment zones are protected to the fullest extent possible. The restoration requirements of this policy can be accomplished on-site or off-site, and shall be in lieu of any coverage transfer or coverage mitigation provision. else where in this Plan.

B. PUBLIC SERVICE FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS NECESSARY FOR PUBLIC HEALTH, SAFETY, OR ENVIRONMENTAL PROTECTION; (2) THERE IS NO REASONABLE ALTERNATIVE, INCLUDING SPANS, WHICH AVOIDS OR REDUCES THE EXPAND OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES; (3) TOE IMPACTS ARE FULLY MITIGATED; AND (4) STREAM ENVIRONMENT ZONE LANDS ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF STREAM

ENVIRONMENT ZONE WHICH IS DISTURBED OR DEVELOPED BY THE PROJECT.

Development within stream environment zones is not consistent with the goal of managing stream environment zones for their natural qualities and shall generally be prohibited except under extraordinary circumstances involving public works. Each circumstance shall be evaluated based on the of this policy can be accomplished on-site or off-site, and shall be in lieu of any coverage transfer or coverage mitigation provisions else where in this Plan.

C. PROJECTS WHICH REQUIRE ACCESS ACROSS STREAM ENVIRONMENT ZONES TO OTHERWISE BUILDABLE SITES ARE PERMISSIBLE IN SEZs IF: (1) THERE IS NO REASONABLE ALTERNATIVE, WHICH AVOIDS OR REDUCES THE EXTENT OF ENCROACHMENT IN THE SEZ, (2) THE IMPACTS ARE FULLY MITIGATED, AND (3)SEE LANDS ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF STREAM ENVIRONMENT ZONE WHICH IS DISTURBED OR DEVELOPED BY THE PROJECT.

The restoration requirements can be accomplished on-site or off-site, and shall be in lieu of any coverage transfer or coverage mitigation provisions else where in this Plan.

D. NEW DEVELOPMENT MAY BE PERMITTED IN MAN-MODIFIED STREAM ENVIRONMENT ZONES WHERE: (1) THE AREA NO LONGER EXHIBITS THE CHARACTERISTICS OF A STREAM ENVIRONMENT ZONE; (2) FURTHER DEVELOPMENT WILL NOT EXACERBATE THE PROBLEMS CAUSED BY DEVELOPMENT IN STREAM ENVIRONMENT ZONES; (3) RESTORATION IS INFEASIBLE; AND (4) MITIGATION IS PROVIDED TO AT LEAST PARTIALLY OFFSET THE LOSSES WHICH WERE



CAUSED BY MODIFICATION OF THE STREAM ENVIRONMENT ZONES.

E. STREAM ENVIRONMENT ZONE RESTORATION PROJECTS AND EROSION CONTROL PROJECTS.

6. REPLACEMENT OF EXISTING COVERAGE IN STREAM ENVIRONMENT ZONES MAY BE PERMITTED WHERE THE PROJECT WILL REDUCE IMPACTS ON STREAM ENVIRONMENT ZONES AND WILL NOT IMPEDE RESTORATION EFFORTS.

Existing structures in stream environment zones may be repaired or rebuilt. Minor reconstruction may be permitted so long as drainage imp m cements, protection of the stream environment zone from disturbances, or other measures are carried out which provide a net benefit to the area's capacity to serve as a naturally-functioning stream environment zone. Major reconstruction or replacement may also be permitted if there is a net benefit to the stream environment zone and if the replacement or reconstruction is consistent with stream environment zone restoration programs (see Policy 1).

7. THE PROCEDURES FOR STREAM ENVIRONMENT ZONE IDENTIFICATION SHALL BE UPDATED.

The Handbook of Best Management Practices establishes a procedure for delineating stream environment and related hydrologic zones. This procedure shall be reviewed and revised pursuant to the recommendations of the Individual Parcel Evaluation technical team. These revisions shall become effective on January 1, 1989. This review and update of the Handbook of Best Management Practices shall include consideration of the procedures to be followed for artificial drainage ways and man-modified stream environment zones.

## DEVELOPMENT AND IMPLEMENTATION PRIORITIES

The Development and Implementation Priorities Subelement coordinates the implementation provisions and time schedules of each Plan Element to achieve and maintain adopted environmental thresholds. To provide for effective management of the Region's resources and attain environmental thresholds, three factors must be considered and planned carefully. First, the feasible rate for

correcting or mitigating existing resource utilization problems will determine how rapidly improvements in environmental quality will take price. Second, the rate and type of new development will absorb or negate some of the progress made toward environmental goals and standards. Third, uncertainty exists regarding the effectiveness of water quality BMPs and programs to reduce vehicle miles traveled.

As an illustration of these factors, reductions in nutrient loads to Lake Tahoe from remedial programs will improve water quality only if remedial measures keep pace with new loads from land coverage and disturbance permitted by the Plan. The timing and phasing of both new development and remedial measures must, therefore, be carefully linked to ensure steady progress toward the environmental thresholds. If BMPs prove to be less effective than originally thought, further adjustments to development and remedial priorities will be required. The Monitoring and Evaluation Subelement identifies study needs for determining the effectiveness of control strategies.

The Plan also must provide incentives for correcting existing problems within the Region. Properly structured incentives can provide for broader participation in meeting regional goals and expedite desired improvements.

GOAL #1 DIRECT ALL RESIDENTIAL DEVELOPMENT FIRST TO THOSE AREAS MOST SUITABLE FOR DEVELOPMENT IN ACCORDANCE WITH ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES AND OTHER CONSIDERATIONS, SUCH AS INFRASTRUCTURE CAPACITY AND PROGRESS TOWARD ACCOMPLISHING WATER QUALITY IMPROVEMENT PROGRAMS.

POLICIES

1. UPON ADOPTION OF THIS PLAN, EVALUATION AND RANKING OF ALL VACANT RESIDENTIAL PARCELS UNDER AN INDIVIDUAL PARCEL EVALUATION SYSTEM (IPES) SHALL BE UNDERTAKEN AND COMPLETED BY DECEMBER 31, 1988. COMMENCING ON



JANUARY 1, 1989, NEW SINGLE-FAMILY DWELLING CONSTRUCTION SHALL BE EVALUATED IN ACCORDANCE WITH IPES. THIS SYSTEM SHALL RANK ALL VACANT RESIDENTIAL PARCELS WITH RESPECT TO THEIR RELATIVE ENVIRONMENTAL SUITABILITY FOR DEVELOPMENT.

REVIEW OF PROJECTS UNDER IPES SHALL NOT COMMENCE UNTIL ALL PARCELS HAVE BEEN EVALUATED AND RANTED IN ACCORDANCE WITH IPES. THE STANDARDS SET FORTH IN GOAL #1, POLICY 2, OF THIS SUBELEMENT SHALL APPLY UNTIL IMPLEMENTATION OF IPES. NEW RESIDENTIAL CONSTRUCTION SHALL BE SUBJECT TO THE ALLOCATION LIMITS SET FORTH IN GOAL #2, POLICY 2 OF THIS SUBELEMENT.

A. IPES is an objective and scientific system based on the report entitled Individual Parcel Evaluation System (1986), which evaluates relative environmental suitability for development. IPES shall evaluate each parcel with respect to the criteria listed below. Details of ICES, including a rating system, shall be included in implementing ordinances.

1) Relative erosion hazard (soil erodability, slope-length and gradient, climatic conditions, surface roughness and mass wasting).

2) Runoff potential (depth to seasonal high water table, percolation rate, permeability and depth to very slowly permeable layer).

3) Degree of difficulty to access building site (amount of excavation and soil disturbance required to provide minimum driveway and parking area and degree of difficulty for excavation due to soil properties).

4) Water influence areas (proximity to and extent of disturbance in water influence areas).

5) Condition of watershed (extent to which watershed and intervening drainage areas conform to land coverage allowances set forth in the land capability

system, hydrologic characteristics and known sediment/nutrient production).

6) Ability to revegetate (climatic conditions and the available water holding capacity, fertility, texture, drainage and permeability of the soil).

7) Need for water quality improvements in vicinity of parcel (stable roadside drainage channels, storm drainage system and stable cut and fill slopes).

B. IPES shall include an element, separate from the criteria used for rating each parcel, to encourage physical mitigation of existing water quality problems by individual property owners. The rating of a parcel may be increased, to a limited and finite degree, by the property owner constructing off-site water quality improvements. The extra consideration for off-site work shall result in benefits that fully offset the difference in impacts between developing the subject parcel and developing a parcel with a rating equivalent to the subject parcel's rating without applying the bonus.

C. IPES shall be implemented by ordinance consistent with the following:

1) A team of experts shall evaluate each vacant residential parcel using a standardized approach in accordance with IPES.

a) For parcels of 1/3 acre or less in size, the entire parcel shall be evaluated for purposes of establishing the ICES rating, except in cases where the parcel contains an SEZ. SEZs shall be excluded from the area evaluated. For parcels with less than 5,000 square feet outside an SEZ, the ICES rating shall be reduced by a factor equal to the ratio of land available for construction to 5,000 square feet (See Goal #1, Policy 2, SEZ Subelement).

b) For parcels greater than 1/3 acre but less than 5 acres in size, the evaluation team shall select and evaluate the 1/3 acre portion of the parcel that results in the highest rating. If the selected 1/3



acre portion contains an SEZ, the procedure set forth in (a) above shall be followed. If the property owner wishes to locate the residence outside the area evaluated, a reevaluation shall be required of the 1/3 acre portion of the parcel containing the desired building site.

c) For parcels of 5 acres or greater in size, the property owner shall be notified and asked to identify the desired building site. Once a building site has been identified, the evaluation team shall evaluate the best 1/3 acre portion of the parcel containing the identified building site. If this 1/3 acre contains an SEZ, the procedures set forth in (a) above shall be followed.

d) Installation of water quality improvements in the vicinity of a parcel, subsequent to the initial rating, may increase the rating of a parcel. The amount of increase shall depend on the weight given that factor in IPES and the degree of water quality improvement.

e) Changes in the condition of a watershed, subsequent to the initial rating, may change the rating of parcels located in that watershed. me amount of change in the rating shell depend on the weight given that factor in IPES. Such changes in the condition of a watershed may comae the initial rating to increase or decrease.

f) The rating of all parcels shall be based on the Gumption that when developed, all required BMPs shall be installed and maintained.

g) Property owners may appeal parcel ratings to an independent body of qualified experts not involved in the original field evaluation of that particular parcel. These independent experts shall then apply the criteria established in IPES. The decision of the independent body shall be deemed the final action of the Agency unless the property owner appeals the decision to the Governing Board. The Governing Board may

change the rating of a parcel only upon expressly finding, based on substantial evidence in the record. that the criteria established in the IPES were not applied correctly.

2) TRPA shall rate all vacant residential parcels numerically and then rank them from the most suitable to the leant suitable by jurisdiction. TRPA may reconsider the rating upon request before the rankings are officially adopted except as otherwise provided in (d) and (e) above.

3) The Agency shall establish a level in the numerical ranking immediately above the most sensitive parcels, based on recommendations from a technical committee.

4) All vacant residential parcels may compete for building allocations. Those above the initial level, referred to in 3) above, and as may be adjusted in accordance with 5) below, shall comprise the top rank and, if receiving an allocation, may pursue a permit. Those below that level, if receiving an allocation, may exercise the options listed below:

   a) transfer the allocation in accordance with policies in Goal #3 of this Subelement.

   b) relinquish the allocation and wait for the level to drop to include the parcel within the top rank.

   c) transfer other development rights as permitted elsewhere in the Plan.

5) The numerical level defining the top rank for any jurisdiction shall be lowered on an annual basis by the number of allocations utilized in that jurisdiction during the previous year, provided that:

   a) all parcels included in the top rank are otherwise eligible for development under the applicable state water quality management plans for the Lake Tahoe Basin and other legal limitations,

   b) a monitoring program for that jurisdiction is in place in accordance with the Monitoring and Evaluation Subelement;

   c) demonstrable progress is being made on capital improvement programs for water quality within that jurisdiction (see Monitoring and Evaluation Subelement) ;

   d) there is a satisfactory rate of reduction in the inventory of vacant sensitive parcels. The IPES line shall not move down in any jurisdiction unless the number of parcels below the IPES line in that jurisdiction, compared to the number that were deemed sensitive on January 1, 1986, does not exceed the following percentages.

| | |
|---|---|
| El Dorado | 20% |
| Placer | 20% |
| Douglas | 33% |
| Washoe | 33% |

   e) the level of compliance with conditions of project approvals within that jurisdiction is satisfactory;

6) Where an allocating authority does not use a random allocation system for IPES allocations after December 31, 1988, its allocations to parcels which are ranked below the line existing on January 1, 1989 may not exceed the number of allocations which would otherwise occur if chosen by a random system.

7) Allowable land coverage for parcels evaluated under IPES shall be a function of the parcel's IPES rating as set forth in Goal #3, Policy 1.C. of the Land Use Subelement.

2. THRU DECEMBER 31, 1988, UNTIL THE INDIVIDUAL PARCEL EVALUATION SYSTEM IS IMPLEMENTED, AN INTERIM SYSTEM SHALL BE UTILIZED FOR REVIEW OF VACANT RESIDENTIAL P EXCELS, SUBJECT TO THE ALLOCATION LIMITS SET FORTH IN GOAL #2, POLICY 2 OF THIS SUBELEMENT.

   A. The following categories of projects shall be eligible to receive a residential permit, provided that, to be eligible under categories 1), 2) or 3), parcels shall, consistent with

the Bailey coefficients, contain sufficient high-capability (land capability districts 4-7) land so that at least 1,200 square feet of impervious surface area can be created on the parcel; and shall be served by at least three of the services listed in Policy 3:

1) Parcels in California with 1983 allocations.

2) Parcels with Placer County permits which were extended by ordinance to August 1, 1986, have expired CTRPA/TRPA permits, and have not commenced construction.

3) Parcels with local county building permits which were issued prior to December 19, 1980, have been continuously renewed, and have not commenced construction.

4) Projects which received TRPA conditional approval prior to August 27, 1983, but which did not receive a TRPA permit prior to May 1, 1984, shall be permitted to proceed under the original conditions of approvals.

B. If not eligible to be processed under A. above, to be eligible to obtain a permit under the interim system, a parcel must meet the criteria set forth below as determined by Agency staff, baaed on field review:

1) The parcel contains sufficient land in Land Capability Districts 4, 5, 6 and 7, so that a single family dwelling and all related land coverage may be constructed in accordance with Agency development standards; and

2) The parcel is served by a paved road, water service utilities, sewer service utilities, and electrical utilities pursuant to Policy 3 below; and

3) The development of the parcel shall not require disturbance or land coverage in land capability districts 1a, 1b SEZ, 1c, 2, and 3, except as provided in Goal #1, Policy 5c, SEZ Subelement; and

4) The parcel shall otherwise be eligible for development under this Plan.



5) Ordinances shall set forth provisions for the waiver of the paved road criteria.

C. If a parcel receiving an allocation is determined to be ineligible for a permit under A. or B. above, the owner may, within applicable time limits set forth in implementing ordinances

1. relinquish the allocation;

2. transfer the allocation to a parcel which is eligible for development in Land Capability Districts 4-7, provided the parcel from which the allocation is transferred is retired in accordance with Goal #3, Policy 4 of this Subelement;

3. combine one or more adjacent parcels in order to meet the criteria in B. above;

4. appeal to the TRPA Governing Board and demonstrate that the parcel meets the criteria in A. or B. above; or

5. transfer other development rights in accordance with Goal #3 of this Subelement.

D. For parcels located in Tyrolian Village Units #1-5, for which complete applications were filed and accepted pursuant to the "Agreement Between The Tyrolian Village Association, Inc. And The Tahoe Regional Planning Agency Regarding Erosion Control Improvements And Reclassification Of Upper Tyrolian Village" dated May 26, 1983, an interim system shall be developed and implemented by ordinance.

3. TO APPROVE A PROJECT ON A PARCEL RATED AND RANKED BY IPES THE PARCEL MUST BE SERVED BY PAVED ROAD, WATER SERVICE, SEWER SERVICE AND ELECTRIC UTILITY. ORDINANCES SHALL SET FORTH PROVISIONS FOR THE WAIVER OF THE PAVED ROAD CRITERIA.

GOAL #2 MANAGE THE GROWTH OF DEVELOPMENT CONSISTENT WITH PROGRESS TOWARD MEETING ENVIRONMENTAL THRESHOLDS.

POLICIES

1. IN 1992 AND EVERY FIVE YEARS THEREAFTER, TRPA SHALL CONDUCT AN INDEPTH REEVALUATION OF THIS PLAN IN COMPARISION WITH PROGRESS TOWARD MEETING THE ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES.

GOAL #3 ENCOURAGE CONSOLIDATION OF DEVELOPMENT THROUGH SEPARATE TRANSFER OF DEVELOPMENT RIGHTS AND TRANSFER OF LAND COVERAGE PROGRAMS.

POLICIES

1. TRANSFERS OF RESIDENTIAL DEVELOPMENT RIGHTS TO PARCELS IN AREAS DESIGNATED AS RECEIVING AREAS IN PLAN AREA STATEMENTS MAY BE PERMITTED. THE NUMBER OF DEVELOPMENT RIGHTS THAT MAY BE TRANSFERRED IS LIMITED TO ONE UNIT FOR UNDEVELOPED PARCELS, OR TO THE NUMBER OF RESIDENTIAL UNITS EXISTING ON A DEVELOPED PARCEL.

   A. RESIDENTIAL DEVELOPMENT RIGHTS MAY BE TRANSFERRED WITH APPROVAL OF TRPA. RESIDENTIAL DEVELOPMENT RIGHTS TRANSFERRED FROM UNDEVELOPED PARCELS MAY ONLY BE EXERCISED ON A RECEIVING PARCEL, UPON RECEIVING A RESIDENTIAL ALLOCATION IN ACCORDANCE WITH THE PROVISIONS REGARDING THOSE ALLOCATIONS.

   B. AS PROVIDED IN GOAL #2 OF THIS SUBELEMENT AND GOAL #2 OF THE LAND USE SUBELEMENT, UP TO 1,600 BONUS UNITS MAY BE GRANTED TO PARCELS FOR MULTI-RESIDENTIAL UNITS IN CONJUNCTION WITH TRANSFER OF DEVELOPMENT RIGHTS FROM OTHER PARCELS OR OZARK AGENCY INCENTIVE PROGRAMS. ORDINANCES SHALL ESTABLISH DETAILED PROVISIONS WHICH SHALL PROVIDE FOR BONUSES OF VARYING AMOUNTS IN RELATION TO A RIGHT TRANSFERRED OR IMPLEMENTION



OF AN AGENCY INCENTIVE PROGRAM, DEPENDING ON THE PUBLIC BENEFITS BEING PROVIDED BY THE PROJECT. MORE BONUSES SENT BE GRANTED FOR PROJECTS WITHIN COMMUNITY PLANS THAN FOR THOSE OUTSIDE CPs. OTHER BENEFITS TO CONSIDER SHALL INCLUDE THE EXTENT OF COVERAGE PLANNED, TRANSPORTATION IMPROVEMENTS, WATER QUALITY IMPROVEMENTS, AND SCENIC IMPROVEMENTS. MORE BONUSES SHALL BE GRANTED FOR PROJECTS DESIGNED TO HOUSE LOCAL RESIDENTS AT MEDIAN INCOME OR BELOW.

2. TRANSFERS OF EXISTING TOURIST ACCOMMODATION UNITS INTO DESIGNATED AREAS MAY BE PERMITTED.

   A. EXISTING TOURIST ACCOMMODATION UNITS MAY BE TRANSFERRED TO DESIGNATED AREAS, IN CONJUNCTION WITH TRPA APPROVAL OF A PROJECT. THE BUILDINGS SHALL BE REMOVED AND THE SITE RESTORED, EXCEPT IN SPECIAL CIRCUMSTANCES OF PUBLIC BENEFIT AS SET FORTH BY ORDINANCE.

   B. AS PROVIDED IN GOAL #2 OF THIS SUBELEMENT AND GOAL #2 OF THE LAND USE SUBELEMENT, UP TO 200 ADDITIONAL UNITS NAY BE GRANTED AS BONUS UNITS IN TEE FIRST TEN YEARS OF THE PLAN IN CONJUNCTION WITH TRANSFER OF DEVELOPMENT RIGHTS. ORDINANCES SHALL ESTABLISH DETAILED PROVISI0NS WHICH SHALL ALLOW BONUSES OF VARYING AMOUNTS IN RELATION TO A UNIT TRANSFERRED, DEPENDING ON THE PUBLIC BENEFITS BEING PROVIDED BY THE PROJECT. NO BONUSES SHALL BE ALLOWED FOR PROJECTS OUTSIDE APPROVED CPs. BENEFITS TO CONSIDER SHALL INCLUDE EXTENT OF COVERAGE PLANNED, TRANSPORTATION IMPROVEMENTS, WATER QUALITY

IMPROVEMENTS, SCENIC IMPROVEMENTS, AND ACCESSORY SERVICES PROVIDED.

3. LAND COVERAGE MAY BE TRANSFERRED AS SET FORTH IN GOAL #3, POLICY 2, OF THE LAND USE SUBELEMENT, WITHIN THE RELATED HYDROLOGIC AREA, PROVIDED THE COVERAGE LIMITS SET FORTH IN THE LAND USE SUBELEMENT ARE NOT EXCEEDED.

   The transfer of land coverage may be implemented by parcel consolidation, parcel retirement, land coverage banking systems or other mechanisms approved by the TRPA.

   A. COVERAGE UTILIZED AS MITIGATION FOR EXCESS COVERAGE ON COMMERCIAL AND TOURIST ACCOMMODATION PROJECTS SHALL BE EXISTING HARD COVERAGE AS DEFINED BY ORDINANCE, EXCEPT WHERE THE GOVERNING BOARD FINDS THAT THERE IS AN INADEQUATE SUPPLY OF HARD COVERAGE AT A REASONABLE COST IN THE RELATED HYDROLOGIC AREA. IN THAT EVENT, THE BOARD MAY AUTHORIZE AN INCREASE IN THE SUPPLY OF COVERAGE FOR TRANSFER IN THE FOLLOWING ORDER OF PRIORITY: (1) INCLUDING EXISTING SOFT COVERAGE OR DISTURBED AREAS WITHIN THE DEFINITION OF COVERAGE, (2) INCLUDING POTENTIAL COVERAGE; AND (3) REDEFINING THE HYDROLOGIC BOUNDARIES IN THAT ARE&. POTENTIAL COVERAGE SHALL BE DEFINED AS BASE COVERAGE.

   B. COVERAGE TRANSFERRED OR USED AS MITIGATION TO ACCOMMODATE RESIDENTIAL PROJECTS, OUTDOOR RECREATION PROJECTS, PUBLIC SERVICE PROJECTS, REGIONAL PUBLIC FACILITIES, AND PUBLIC HEALTH AND SAFETY FACILITIES MAY BE EITHER EXISTING OR POTENTIAL COVERAGE. POTENTIAL COVERAGE SHALL BE DEFINED AS BASE COVERAGE.

   C. LINEAR PUBLIC FACILITIES PROJECTS, WHEN



TRANSFERRING OR MITIGATING COVERAGE OVER BASE COVERAGE, SHALL HAVE THE OPTION OF TRANSFERRING HARD OR SOFT COVERAGE IN ACCORDANCE WITH THESE PROVISIONS.

   D. TRPA, IN COOPERATION WITH OTHER AGENCIES, SHALL ESTABLISH A LAND COVERAGE BANKING SYSTEM.

      TRPA, to the extent possible, shall utilize a land coverage banking system to facilitate the elimination of excess land coverage and to provide transfer mechanisms. TRPA shall certify appropriate entities to acquire land coverage and implement restoration programs pursuant to this policy.

   E. COVERAGE TRANSFERS SHALL BE AT A RATIO OF 1:1 OR GREATER. EACH SQUARE FOOT OF COVERAGE ADDED BY TRANSFER SHALL REQUIRE REMOVAL OF ONE SQUARE FOOT OF COVERAGE, EXCEPT FOR THE SPECIAL PROVISION FOR ADDITIONAL COMMERCIAL COVERAGE OVER 50 PERCENT, AS SET FORTH IN THE LAND USE SUBELEMENT GOAL #3, POLICY 2.B AND OTHER RATIOS AS SET BY THIS PLAN.

   F. COVERAGE TRANSFERRED FOR A SINGLE-FAMILY HOUSE SHALL BE FROM A PARCEL EQUAL TO, OR MORE ENVIRONMENTALLY SENSITIVE THAN, THE RECEIVING PARCEL.

   G. IN THE CASE OF INDIVIDUAL PARCELS CONTAINING A STREAM ENVIRONMENT ZONE (SEZ), THE AMOUNT OF COVERAGE ATTRIBUTABLE TO THE SEE PORTION OF THE PARCEL MAY BE TRANSFERRED TO THE NON-SEZ PORTION OF THE PARCEL OR MAY BE UTILIZED IN THE SEZ PURSUANT TO THE ACCESS PROVISION SET FORTH IN GOAL #1, POLICY 5, OF THE STREAM ENVIRONMENT ZONE SUBELEMENT.

4. THE RESIDENTIAL PERMIT ALLOCATION SYSTEM SHALL PERMIT THE TRANSFER OF BUILDING

ALLOCATIONS FROM PARCELS LOCATED ON SENSITIVE LANDS TO MORE SUITABLE PARCELS.

As part of the permit allocation system, TRPA shall permit the transfer of building allocations from parcels in stream environment zones, Land Capability Districts 1-3, lands determined to be sensitive under IPES, or Class 1-4 shorezones, to parcels outside of these areas. However, no allocations shall be transferred to any parcel that is below the level defining the IPES top rank on January 1, 1989 unless the number of vacant parcels in the top rank is less than one-half the total inventory in that jurisdiction. Recipients of allocations may transfer across jurisdictional boundaries so long as the jurisdiction to which allocations are transferred has capacity to serve the additional development, both jurisdictions approve the transfer, and the receiving parcel is in land capability districts 4 - 7 or has an IPES rating above the January, 1989 level. Such interjurisdictional transfers shall be counted against the number of permits allocated to the jurisdiction from which the allocations are transferred.

5. BEFORE TRANSFER OF ANY DEVELOPMENT RIGHT OR LAND COVERAGE UNDER THIS GOAL IS EFFECTIVE, THE TRANSFERROR LOT SHALL BE APPROPRIATELY RESTRICTED OR RETIRED. IN THE CASE WHERE AN ALLOCATION HAS BEEN TRANSFERRED, OR ALL THE DEVELOPMENT RIGHTS OR COVERAGE HAS BEEN TRANSFERRED OFF A PARCEL DEEMED INAPPROPRIATE FOR FUTURE DEVELOPMENT, THE ENTIRE PARCEL SHALL BE RETIRED.

   In restricting or retiring a parcel, the implementing ordinances shall consider the retirement of all bonded indebtedness, site restoration, removal of future development potential, disclosure statements, public notice or recordation, and other requirements TRPA deems necessary. All transfers shall be approved by the affected jurisdictions.

6. TRANSFERS OF DEVELOPMENT RIGHTS, OTHER THAN LAND COVERAGE, SHALL BE LIMITED TO EQUIVALENT USES WITH NO INCREASE IN THE PARAMETERS BY WHICH THE USES ARE MEASURED



   BY THIS PLAN (E.G., FLOOR AREA, UNITS, PAOT). EQUIVALENT USES SHALL BE DEFINED BY ORDINANCE. DEVELOPMENT IMPACTS DUE TO THE RESULTING PROJECTS SHALL BE ADDRESSED AS PART OF THE PROJECT REVIEW PROCESS.

GOAL #4 CONDITION APPROVALS FOR NEW DEVELOPMENT IN THE TAHOE REGION ON POSITIVE IMPROVEMENTS IN OFF- SITE EROSION AND RUNOFF CONTROL AND AIR QUALITY.

To generate offsetting mitigation measures, which in turn will accelerate progress toward meeting the environmental thresholds, the Agency will implement the following policies:

POLICIES

1. NEW RESIDENTIAL, COMMERCIAL, AND PUBLIC PROJECTS SHALL COMPLETELY OFFSET THEIR WATER QUALITY IMPACTS THROUGH ONE OF THE FOLLOWING METHODS:

   A. IMPLEMENTING OFF-SITE EROSION AND RUNOFF CONTROL PROJECTS AS A CONDITION OF PROJECT APPROVAL AND SUBJECT TO AGENCY CONCURRENCE AS TO EFFECTIVENESS, OR

   B. CONTRIBUTING TO A FUND ESTABLISHED BY THE AGENCY FOR IMPLEMENTING OFF- SITE EROSION AND RUNOFF CONTROL PROJECTS. THE AMOUNT OF SUCH CONTRIBUTIONS IS ESTABLISHED BY AGENCY ORDINANCE.

      This policy continues the water quality mitigation funds established as part of TRPA's Lake Tahoe Basin Water Quality Management Plan. The fee schedules and distribution formula shall be reviewed and revised as part of the Agency's implementing ordinances and programs.

2. ALL PROJECTS SHALL OFFSET THE TRANSPORTATION AND AIR QUALITY IMPACTS OF THEIR DEVELOPMENT.

   The implementing ordinances for the Regional Plan will define stationary sources of air pollution which may locate in the Region, and define what constitutes a significant

environmental impact on air quality from stationary sources. Commercial and residential development contribute indirect impacts to air quality by increasing the number of vehicle trips in the Region. The cumulative impact of such trips is significant.



**EXHIBIT C TO SCHOLLEY AFFIDAVIT**

20.3 Land Coverage Limitations: No person shall create land coverage in excess of the limitations set forth in this chapter. This means to determine base land coverage, the manner to transfer land coverage and prohibitions of certain land coverage are set forth in this Section.

20.3.A Base Land Coverage Requirements: The allowable base land coverage ("base coverage") shall be determined by using the coefficients set forth in the report entitled, Land Capability Classifications of the Lake Tahoe Basin, Bailey, R.G. 1974. These coefficients are:

| Lands Located In Land Capability District* | Base Coverage |
|---|---|
| 1a, 1b, 1c | 1% |
| 2 | 1% |
| 3 | 5% |
| 4 | 20% |
| 5 | 25% |
| 6, 7 | 30% |

*Lands located in Geomorphic Group I are classified land capability district 1 and are permitted one percent coverage.

20.3.A (1) General Rule: Except as provided in Subparagraphs 20.3.A(2), (3) and (4), the coefficients shall be applied to the project area in accordance with Subsection 20.3.D.

(2) Parcels In TRPA-Approved Subdivisions In Conformance With The Bailey Coefficients: In TRPA approved subdivisions where TRPA applied the coefficients on a subdivision-wide basis, and allowable coverages then were assigned to individual parcels, the assigned coverages shall be the base coverages for those parcels. The list of TRPA-approved subdivision in conformance with Bailey coefficients is Attachment D to the Goals and Policies.

(3) Parcels In Existing Planned Unit Developments (PUDs) Not In Conformance With The Bailey Coefficients: To determine the allowable base

coverage for parcels with; n an existing PUD, the coefficients shall be applied to the entire PUD. This total allowable coverage, minus existing the common area facilities coverage, shall be divided among the individual parcels in proportion to their respective sizes whether developed or not. Public rights-of-way shall not be included in the calculation. Accordingly, the method of calculation is as follows: first, the area of public rights-of-way is not to be counted second, allowable base coverage for the remaining area in the PUD is calculated; third, the amount of existing coverage of common areas is subtracted fourth, the remaining coverage is divided among the individual parcels, in proportion to size. In no case shall parcels of individual ownership be assigned an allowable base coverage of less than zero.

Example of calculation:

PUD Example: Five acre PUD (not including public rights-of-way) with 10 individual 50 x 50 parcels located in Land Capability District 4. Existing common area improvements such as parking, tennis court, and recreation center = 30,000 square feet of land coverage

- PUD size (217,800) x Coverage Coefficient (20%) Allowable Base Coverage (43,560)

Allowable Base Coverage (43,560) - Existing Improvements (30,000) = Remaining Allowable Base Coverage (13,560)

(20.3.A) Remaining Allowable Base Coverage (13,560) ÷ Number of Parcels (10) = Allowable Base Coverage Per Parcel (1,350)

(4) Relationship To IPES: Except as set forth in (2) and (3) above, the Individual Parcel Evaluation System ("IPES") ratings shall be used to determine allowable coverage for single family houses subject to IPES pursuant to Chapter 37.

20.3.B Transferred Land Coverage Requirements: In addition to the base coverage prescribed by Subsection 20.3.A,



land coverage may be transferred to a parcel pursuant to Subsection 20.3.C. Parcels and uses eligible for transfer of land coverage are set forth in this Subsection. The aggregate of base coverage and coverage transferred shall not exceed the limitations set forth below:

(1) Residential Facilities (1 to 4 Units): The maximum land coverage (base coverage plus transferred coverage) allowed on a parcel for residential facilities of four units or less is the coverage allowed pursuant to the coefficients in Subsection 20.3.A, or as follows, whichever is greater:

(a) Maximum Parcel Coverages:

| Project Area (Sq. Ft.) | Maximum Land Coverage |
|---|---|
| 0 - 4,000 | Base Land Coverage Only |
| 4,001 - 9,000 | 1,800 sq. Ft. |
| 9,001 - 14,000 | 20% of Project Area |
| 14,001 - 16,000 | 2,900 sq. ft. |
| 16,001 - 20,000 | 3,000 sq. ft. |
| 20,001 - 25,000 | 3,100 sq. ft. |
| 25,001 - 30,000 | 3,200 sq. ft. |
| 30,001 - 40,000 | 3,300 sq. ft. |
| 40,001 - 50,000 | 3,400 sq. ft. |
| 50,001 - 70,000 | 3,500 sq. ft. |
| 70,001 - 90,000 | 3,600 sq. Ft. |
| 90,001 - 120,000 | 3,700 sq. Ft. |
| 120,001 - 150,000 | 3,800 sq. Ft. |
| 150,001 - 200,000 | 3,900 sq. Ft. |
| 200,001 - 400,000 | 4,000 sq ft. |

(b) Planned Unit Developments: For parcels in planned unit developments, the maximum coverage allowed shall be 100 percent of the square feet, whichever is less. Parcels in PUDs with five or more units per parcel are considered

multi-residential and regulated pursuant to Subparagraph 20.3.B(3).

(c) Special Transfer Programs: Parcels in subdivisions with TRPA-approved transfer programs may be permitted the coverage specified by that approval. The only subdivision with such a program, as of the effective date of the Regional Plan, is Cave Rock Estates, Unit No. 3. The Cave Rock Estates, Unit No. 3 transfer program is set forth in the TRPA March 23, 1978 approval of that subdivision.

(d) Driveways: The maximum limits in Subparagraph 20.3.B(l)(a) may be increased by a transfer of land coverage for a driveway built in accordance with the standards in Chapter 24, which is to be created in connection with the construction of a single family house on an existing parcel, provided TRPA finds that:

(i) The construction will not result in a residential structure with land coverage greater than that permitted in Subparagraph 20.3.B(1) minus 400 square feet; and

(ii) The single family house, as a direct result of the increased land coverage, will be located on the parcel at the site found by TRPA to cause the least harm to the natural environment through minimization of land alterations, grading, removal of vegetation and preservation of tree. and other flora.

(2) Commercial Facilities: The maximum land coverage (base coverage plus transferred coverage) allowed on a parcel for commercial facilities located within community plans approved pursuant to Chapter 14 is as follows:



(a) For parcels upon which there is no development legally existing as of the effective date of the Regional Plan, maximum land coverage is 70 percent of the project area, which area is located within land capability districts 4 through 7, inclusive; and

(b) For parcels upon which there legally exists development as of the effective date of the Regional Plan, maximum land coverage is 50 percent of the project area, which area is located within land capability districts 4 through 7, inclusive.

(3) Tourist Accommodation Facilities, Multi-Residential Facilities (Five Or More Units), Public Service Facilities, And Recreation Facilities: The maximum land coverage (base coverage plus transferred coverage) allowed on a parcel for tourist accommodation facilities, multi-residential facilities of five units or more, public service facilities and recreation facilities is limited to 50 percent of the project area, provided the parcel is located within a community plan approved pursuant to Chapter 14. Such land coverage may be used only on the project area located within land capability districts 4 through 7, inclusive, referred to in Subsection 20.3.A. The provisions of this Subsection apply to parcels legally

existing on the effective date of the Regional Plan, upon which there exists no development, or, upon which there lawfully exists tourist accommodation, multi-residential (five or more units), public service, or recreation facilities.

(4) Linear Public Facilities And Public Health And Safety Facilities: The maximum land coverage (base coverage plus transferred coverage) for linear public facilities and public health and safety facilities is limited to the minimum amount needed to achieve their public purpose. Such transfer may be permitted, provided TRPA makes the following findings:

(a) The project is on the list of additional public service facilities if required pursuant to Section 33.5;

(b) There is no feasible alternative that would reduce land coverage,

(c) The project, because of its unusual configuration or service requirement, requires special consideration; and

(d) The facility primarily serves the needs of persons other than those who are, or will be, residents of the lands in question, or the owners of the land in question.

(5) Highways, Streets and Roads: Transfer of land coverage for highways, streets and roads may be permitted, provided TRPA, in addition to the findings in paragraph (4) above, makes the following findings:

(a) The highway, street, or road is required to provide access to



property other than that owned by the applicant; and

(b) The highway, street, or road will be constructed or maintained by a public agency, or is required to be so constructed or maintained by the terms and in accordance with the boundaries of a lawfully created easement recorded prior to February 10, 1972, or is required or approved by TRPA for a project approved after the effective date of the Regional Plan.

(6) Other Public Service Facilities Outside Community Plans: The maximum land coverage (base coverage plus transferred coverage) for other public service facilities located outside of an approved community plan is 50 percent of the project area. Transfer of land coverage for public service facilities located outside a community plan is limited to projects for which TRPA has made the following findings:

(a) The project is on the list of additional public service facilities if required pursuant to Section 33.5;

(b) There is no feasible alternative that would reduce land coverage; and

(c) There is a demonstrated need and requirement to locate the facility outside a community plan.

(7) Facilities For Public Safety And Access Of The Handicapped: Transfer of land coverage may be permitted for the addition of facilities for access of handicapped persons and for compliance with public safety laws, to facilities legally existing on the effective date of the

Regional Plan. The maximum land coverage (base coverage plus transferred coverage) shall be the minimum amount required to provide access to handicapped persons occupying a residence or as required by local, state or federal law.

(8) Water quality Control Facilities: Transfer of land coverage for water quality control facilities, such as erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar projects, programs and facilities, may be permitted the minimum amount of land coverage needed to achieve their purpose provided there is not reasonable alternative, including relocation, which avoids or reduces the land coverage.

20.3.C Manner Of Transferring Land Coverage: Land coverage transferred to eligible parcels for eligible uses prescribed by Subsection 20.3.B, shall be transferred in the manner set forth in this Subsection. A transfer of land coverage may be from one parcel to another and may occur in connection with TRPA's approval of: a project: a community plan; redevelopment plant a specific or master plan; or a transfer of coverage program for a subdivision. Transfers shall be recorded in accordance with Chapter 38, shall not result in land coverage on eligible parcels in excess of the maximum amounts prescribed by Subsection 20.3.B, and shall be in accordance with the provisions of this chapter. Transfers may be undertaken in connection with Chapter 34. Removal of existing land coverage without transfer in connection with a project, in the manner and as otherwise required by this chapter, may be accomplished, by crediting the coverage account of the pertinent parcel pursuant to Chapter 38. Land coverage banks may be designated by TRPA pursuant to Chapter 38, which banks may provide a supply of land



coverage to accommodate individuals needing coverage for transfer purposes.

(1) Land Coverage Transfer Ratios: Land coverage transferred from one parcel ("sending parcel.) to another parcel ("receiving parcel") shall be in accordance with the following ratios:

(a) General: Except for transfers relating to commercial uses within approved community plans, the transfer of one square foot of land coverage to a receiving parcel requires the retirement of one square foot of land coverage on the sending parcel (1:1 transfer ratio).

(b) Commercial Uses Within Approved Community Plans: Receiving parcels within approved community plans, upon which there exist commercial facilities, shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), up to the maximum 50 percent land coverage prescribed by Subparagraph 20.3.B(2)(b). Undeveloped receiving parcels within approved community plans, eligible for the maximum 70 percent land coverage prescribed by Subparagraph 20.3.B.2(a), shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), until the total land coverage reaches 50 percent of the project area. Undeveloped parcels shall be eligible to receive additional transferred land coverage in excess of the 50 percent limit, until the total land coverage reaches the maximum 70 percent, provided the additional coverage over 50 percent shall be transferred at the ratio set forth in the following chart:

| Percent of Final Coverage | Transfer Ratio |
|---|---|
| 51 | 1.05:1 |
| 52 | 1.1:1 |
| 53 | 1.15:1 |

| | |
|---|---|
| 54 | 1.2:1 |
| 55 | 1.25:1 |
| 56 | 1.3:1 |
| 57 | 1.35:1 |
| 58 | 1.4:1 |
| 59 | 1.45:1 |
| 60 | 1.5:1 |
| 61 | 1.55:1 |
| 62 | 1.6:1 |
| 63 | 1.65:1 |
| 64 | 1.7:1 |
| 65 | 1.75:1 |
| 66 | 1.8:1 |
| 67 | 1.9:1 |
| 68 | 1.95:1 |
| 70 | 2:1 |

Transfer Example:

Five Acre Parcel = 217,800 so. ft.
Allowable Base Coverage = 30% = 65,340 so. ft.
Proposed Project Coverage - 60% = 130,680 so. ft.

Transfer Requirement

| | | |
|---|---|---|
| 0 to 30% - None | = | 0 |
| 30 to 50% - 1:1 | = | 43,560 so. ft. |
| 50 to 60% - 1.5:1 | = | 32,670 so. ft. |
| Total Coverage to be Transfered | | 76,230 so. ft. |

(2) Types Of Land Coverage Eligible For Transfer: The following types or classes of legally established land coverage are eligible for transfer to receiving parcels in accordance with the provisions of this Chapter:

(a) Hard Coverage: Hard land coverage may be transferred in all cases.

(b) Soft Coverage: Soft land coverage may be transferred in all cases, except for transfers relating to commercial or tourist accommodation uses or facilities.

(c) Base Coverage: Unused allowable base land coverage referred to in Subsection 20.3.A may



be transferred in all cases, except for transfers relating to commercial uses or facilities. Land coverage transferred as mitigation for excess coverage associated with commercial and tourist accommodation projects shall be existing hard coverage except as provided in Subparagraph 20.3.C(6)

(d) Coverage For Single Family House: Coverage transferred for a single family house, including, but not limited to, a house to be constructed pursuant to IPES, shall be from a sending parcel as environmentally sensitive as, or more environmentally sensitive than, the receiving parcel. If both sending and receiving parcels have not received IPES rating scores, relative environmental sensitivity shall be determined by comparing the land capability classification of each parcel. If both parcels have IPES rating scores, sensitivity shall be determined by comparing the scores of each. If one parcel has an IPES rating score and the other does not, TRPA shall determine sensitivity.

(e) Coverage for Water Quality Control Facilities: control facilities pursuant to Subsection 20.3.B(8l shall be in accordance with (a) through (c) above, or shall be mitigated through restoration in accordance with Subsection 20.4.C, in the amount of 1.5 times the area of land covered or disturbed for the project beyond that permitted by the co-efficients in Subsection 20.3.A.

(3) Sending Parcels Classified As Sensitive Lands (Land Capability Districts 1-3): If land coverage is transferred from a sending parcel that is located, in whole or in part, in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired in the manner set forth in Subparagraph 20.3.C(7) and may not be returned to the sending parcel.

(4) Sending Parcels Classified As High Capability Lands (Land Capability Districts 4-7): If land coverage is transferred from a sending parcel that is located entirely within Land Capability Districts 4 through 7, inclusive, or is above the initial level defining the top rank under IPES (i.e., 725), land coverage may be returned to the sending parcel subject to the limitations of Subsections 20.3.A and 20.3.B.

(5) Hydrologically Related Area *Transfer* Limitation: For all land coverage transfers, the receiving parcel and the sending parcel shall be in the same hydrologically related area. The hydrologically related area boundaries are depicted upon the TRPA Plan Area Overlays and are incorporated herein. Transfer across said boundaries is prohibited.

(6) Inadequate Supply Of Land Coverage: If TRPA, after conducting a mandatory annual review of the cost of land coverage available at the land bank, finds there is an inadequate supply of hard land coverage for commercial or tourist accommodation uses at a reasonable cost within a given hydrologically related area, TRPA may authorize an increase in the supply of land coverage for transfer in the order of priority set forth below. In determining "reasonable cost," TRPA shall consider: whether there is no market for the coverage due to its cost, limited supply or simple absence of transactions; and other pertinent factors. Prior to authorizing an increase in supply of land coverage, TRPA also shall consider the effect of the increase on the inventory in the land bank and the value of investments made by the bank in hard or soft land coverage. If TRPA authorizes an increase in the supply of land coverage, it shall do so in the following order of priority:

(a) Existing soft coverage as described in the definition of "land coverage."



(b) Unused base coverage, referred to in the Goals and Policies as "potential coverage."

(c) Through redefinition of the boundaries of the hydrologically related area to increase the supply of coverage.

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provision for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.

(b) Retirement Of Land Coverage For Credit: In the event land coverage is retired on one parcel, but is not proposed for immediate transfer to another parcel, the applicant shall comply with Subparagraph 20.3.C(7)(a)(i) and (ii), to assure credit for the retired coverage in accordance with Chapter 38.

(8) Land Bank: Land coverage transfers and land coverage retirement programs may use a land bank pursuant to Chapter 38

20.3.D Method Of Calculation Of Land Coverage: Land coverage requirements shall be implemented by application of the percentage coverage figures set forth in Subsections 20.3.A and 20.3.B to the area of the project. Determination of the project area and the method of applying the percentage coverage figures to the project area are set forth in this Subsection.

(1) Determination Of The Project Area: The project area shall be calculated as follows:

(a) Boundaries Or Area Of Land Involved:

(i) For a project on a single parcel, the area of the project is the area of the parcel.

(ii) For a project on or comprising two or more contiguous parcels, the project area is the total combined square footage of the parcels, provided the parcels are merged pursuant to Chapter 45. If the parcels are not merged, the owner shall record against the parcels a deed restriction, or other covenant running with the land, permanently assuring that the land coverage calculations for the parcels shall always be made as if the parcels had been legally merged.

(iii) Where the proposed activity or project, for which land coverage is to be calculated, is a use accessory to an existing primary use located on or comprising one or more adjacent parcels, the project area for the accessory use is the total combined square footage of all of said parcels, owned or controlled by the same person, provided the parcels are merged pursuant to Chapter 45. If the parcels are not merged the owner shall record



against the parcels a deed restriction, or other covenant running with the land, permanently assuring that the coverage calculations for the parcels shall always be made as if the parcels had been legally merged.

(iv) For a project on a single parcel in excess of 20 acres, or on an area of land not consisting of a parcel, TRPA shall determine the project area based upon the following factors, among others, appropriate for this purpose: the area impacted by or the sphere of influence of the project; the area to be actually used for the project: whether the project is located in one or more hydrologically related areas; and the extent of land coverage and land disturbance for the project.

(b) Land Not Included In The Project Area: The project area shall not include lands lakeward of the high-water lines of bodies of water, such as lakes and ponds, lands underlying covered surfaces associated with existing linear public facilities, highway, streets, and roads, referred to in Subsection 20.3.S, and easements or rights-of-way allowing potential land coverage for linear public facilities, highways, streets, and roads. Land coverage associated with existing linear public facilities, highway, street. and roads shall not be considered in the calculation of land coverage, except as pertinent to the review by TRPA of the facilities, highway, streets or roads, or as required pursuant to Subsection 20.3.D(2)(c).

(c) Separate Calculation For The Area Within Each Land Capability District: With the exception of land coverage for IPES pursuant to Chapter 37, land coverage shall be

calculated by reference to the square footage area of each, separate land capability district located within the project area, applying the applicable percentage coverage figures set forth in Subsections 20.3.A and 20.3.B to the square footage within each respective land capability district.

(2) Application Of Percentage Coverage Figures To The Project Area: The percentage coverage figures shall be applied to the project area as follows:

(a) Base Coverage: The amount of base land coverage shall be calculated by applying the percentage coverage figures set forth in Subsection 20.3.A to the project area determined pursuant to Subsection 20.3.D(1). Base land coverage placed upon the portions of the project area within Land Capability Districts 1 through 3, inclusive, shall not exceed, as to each such portion, the maximum amount of land coverage determined by applying the corresponding percentage coverage figure to the area of each such portion. With respect to an area of the project containing land within Land Capability Districts 4 through 7, inclusive, the following rules apply:

(i) For a parcel or other project area up to and including one-third (1/3) of an acre, base coverage attributable to all land capability districts on the parcel may be aggregated and the resulting total coverage placed at any location on the parcel lying within Land Capability Districts 4 through 7, inclusive, but not within Land Capability Districts 1 through 3, inclusive.

(ii) For a parcel or other area of the project over one-third (1/3) of an acre, base coverages attributable to land within Land Capability District 4 through 7,



inclusive, may be placed upon the pertinent land, up to the maximum amount of land coverage determined by applying the corresponding percentage coverage figure. Aggregate base coverages attributable to portions of the parcel or other project area within Land Capability Districts 1 through 3, inclusive, also may be placed at any location on the parcel or such other area lying within Land Capability Districts 4 through 7, inclusive. No coverage shall be placed on any land within Land Capability Districts 1 through 3, inclusive, except as provided in Subsection 20.3.A.

(iii) As an alternative to Subparagraph 20.3.D(2)(a)(ii), the percentage coverage figure corresponding to the lowest land capability district number of Land Capability Districts 4 through 7, inclusive, that exists on the parcel or other project area, may be applied to the total area encompassed by Land Capability Districts 4 through 7, inclusive, to determine the amount of coverage, to which amount may be added the aggregate of base coverages attributable to portions of the parcel or other project area within Land Capability Districts 1 through 3, inclusive. No coverage shall be placed on any land within Land Capability Districts 1 through 3, inclusive, except as provided in Subsection 20.3.A.

(b) Transferred Coverage: In the event additional coverage is permitted by transfer of land coverage pursuant to Subsection 20.3.B, the amount of total coverage shall be calculated by applying the percentage coverage figures set

forth in Subsection 20.3.B to the project area determined pursuant to Subparagraph 20.3.D(1).

(c) Land Coverage In Right-Of-Way: Existing or proposed land coverage in a public street or highway right-of-way shall be attributable to the owner of the right-of-way. Proposed coverage in such right-of-way shall be pursuant to a transfer of land coverage based upon a ratio of one square foot of land coverage retired for each square foot of new coverage proposed. Transfer of such coverage shall be pursuant to the requirements of Subsection 20.3.C. The owner of the right-of-way may arrange the transfer of land coverage with the person, if any, benefiting from the proposed land coverage in the right-of-way.

(3) Calculation Of Permissible Land Coverage Under IPES: Calculation of permissible land coverage for parcels subject to IPES shall be in accordance with Chapter 37.

(4) Overhang Allowance: For every three feet off of the ground surface, one foot of the horizontal overhang dimension shall be excluded from land coverage calculations. The remainder of the overhang shall be counted.

20.4 Prohibition Of Additional Land Coverage In Land Capability Districts 1a, 1c, 2 And 3 And 1b (Stream Environment Zones): No additional land coverage or other permanent land disturbance shall be permitted in Land Capability Districts 1a, 1o, 2, and 3 and Land Capability District 1b (stream environment zones) except as follows:

20.4.A Exceptions For Land Capability Districts 1a, 1o, 2 And 3 Prohibition: The following exceptions apply to the prohibition of land coverage and disturbance in Land Capability Districts 1a, 1c, 2 and 3:



(1) IPES: Land coverage and disturbance for single family houses may be permitted in Land Capability Districts 1a, 1o, 2 and 3, when reviewed and approved pursuant to IPES in accordance with Chapter 37.

(2) Public Outdoor Recreation Facilities: Land coverage and disturbance for public outdoor recreation facilities, which includes public; recreation projects on public lands, private recreation projects through use of public lands, and private recreational projects on private lands that are depicted or provided for on a public agency's recreational plan, may be permitted in Land Capability Districts 1a, 1c, 2 and 3 if TRPA finds that:

(a) The project is a necessary part of a public agency's long-range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature, must be sited in Land Capability Districts 1a, 1c, 2 or 3, such as a ski run or hiking trail; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3, or SEZs), Water Quality Management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which avoids or reduces the extent of encroachment in Land Capability Districts 1a, 1o, 2 and 3; and

(e) The impacts of the coverage and disturbance are fully mitigated through means including, but not limited to, the following:

(i) Application of best management practices; and

(ii) Restoration, in accordance with Section 20.4.C, of land in Land Capability Districts la, lc, 2 and 3 in the amount of 1.5 times the area of land in such districts covered or disturbed for the project beyond that permitted by the coefficients in Subsection 20.3.A.

(3) Public Service Facilities: Land coverage and disturbance .for public service facilities may be permitted in Land Capability Districts la, lc, 2 and 3 if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in Land Capability Districts la, lc, 2 and 3; and .

(c) The impacts of the coverage and disturbance are fully mitigated in the manner prescribed by Subparagraph 20.4.A(2)(e).

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability Districts la, lc, 2 and 3 for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects, and similar projects, programs and facilities if TRPA finds that:

(a) The project, program or facility is necessary for environmental protection; and

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in Land Capability Districts la, lc, 2 and 3.

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

(5) Tyrolian Village: Land coverage and disturbance for single family houses may be permitted in Land



Capability Districts la, lc, 2 and 3, when reviewed and approved in accordance with Chapter 36, on parcels in Tyrolian Village, Units #l through 5, inclusive, for which complete applications were filed and accepted by TRPA pursuant to the "Agreement Between The Tyrolian Village, Inc. And The Tahoe Regional Planning Agency Regarding Erosion Control Improvements And Reclassification Of Upper Tyrolian Village" dated May 26, 1983."

20.4.B Exceptions For Land Capability District 1b (Stream Environment Zone): The following exceptions apply to the prohibition of land coverage and disturbance in land capability district 1b (stream environment zone):

(1) Stream Crossings: Land coverage and disturbance for projects to effect access across steam environment zones to otherwise buildable sites, if such projects otherwise comply with applicable development standards in Chapter 27, may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone, or that encroachment is necessary to reach the building site recommended by IPES; and

(b) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(2) Public Outdoor Recreation: Land coverage and disturbance for public outdoor recreation facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is a necessary part of a public agency's long range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature must be sited in a stream environment zone, such as bridges, stream crossings, ski run crossings, fishing trails, and boat launching facilities; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3 or SEZs), Water Quality management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which would avoid or reduce the extent of encroachment in the stream environment zone; and

(e) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and



shall include coverage and disturbance within the permitted Bailey coefficients.

(3) Public Service: Land coverage and disturbance for public service facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including a bridge span or relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability District 1b (stream environment zones) for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar programs and facilities if TRPA finds that:

(a) The project, program, or facility is necessary for environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

20.4.C Restoration Requirements: The following requirements apply to restoration:

(1) The restoration requirements of Subparagraphs 20.3.C(2)(e) and 20.4.A(2)(e), may be accomplished onsite or offsite by the applicant or another agency approved by TRPA. Such restoration requirements shall be in lieu of any land coverage transfer requirement or water quality mitigation fee pursuant to Chapter 82.

(2) Only land which has been disturbed or consists of hard coverage or soft coverage shall be eligible for credit for restoration. Restoration plans shall require restoration to cause the area to function in a natural state with provisions for permanent protection from further disturbance. Lands disturbed by the project and then restored are not eligible for credit. Permanent protection from further disturbance shall include, but not be limited to, recordation by the owner of deed restrictions, or other covenants running with the land, on a form approved by TRPA, against parcels in private ownership, permanently assuring the restoration requirements of Subparagraphs 20.3.C(2)(e) or 20.4.A(2)(e), as applicable. TRPA shall obtain appropriate assurance from a public agency that the requirements of Subparagraph 20.3.C (2)(e) or 20.4.A(2)(e), as applicable are met.

20.5 Excess Land Coverage Mitigation Program: This Section applies to projects where the amount of land coverage existing prior to the project in the project area exceeds the base land coverage for the project area prescribed by Subsection 20.3.A. Land coverage in excess of the base land coverage shall be mitigated by the transfer of land coverage pursuant to Subsection 20.3.C or the land coverage mitigation program set forth in this Section.



# CHAPTER 34
# TRANSFER OF DEVELOPMENT

Chapter Contents

34.0 Purpose
34.1 Applicability
34.2 Transfer Of Residential Development Right
34.3 Transfer Of Residential Allocations
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34.0 Purpose This chapter sets forth the provisions for the transfer of residential- development rights, residential allocations, and existing development, from one parcel to another as provided in the Goals and Policies, Development and Implementation Priorities Subelement, Implementation Element, Goal #3, Policies 1 - 5. The transfer of land coverage is addressed in Chapter 20.

34.1 Applicability: This chapter applies to the transfer of residential development rights, residential allocations, and existing development. All such transfers require TRPA approval. Transfer of a residential development right or allocation does not constitute a project approval. Transfers of existing development can occur only in conjunction with a project.

34.2 Transfer Of Residential Development Right A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;

34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or

community plan where residential uses are permissible and shall meat the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.



34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transfered.

34.4 Transfer Or Relocation Of Existing Development: Certain elements of existing development may be transferred or relocated from one parcel to another if the receiving parcel is in a plan area or community plan area designated as a receiving area for existing development. Existing residential development may be transferred to any plan area where residential use is a permissible use. The transfer of existing development shall not be considered additional development and is exempt from the applicable allocation system.

34.4.A Eligibility: The following elements of the existing development shall be eligible for transfer:

(1) Units Of Use: Units of use may be transferred within the same major use classifications e.g., residential, tourist accommodation,

commercial, public service and recreation. The amount of use transferred shall be measured in appropriate units of use, e.g. residential units, tourist accommodation units, commercial floor area, and PAOTs.

(2) Land Coverage: Land coverage may be transferred pursuant to Chapter 20.

34.4.B Requirements: Transfers of existing development may be permitted pursuant to the following requirements:

(1) The transfer is limited to the units of use, and land coverage existing on the parcel from which the development is to be removed;

(2) The use transferred is a permissible use on the receiving parcel as set forth in the plan area statement or community plan;

(3) The transfer complies with the site development provisions established by this Code and plan area statements for the receiving parcel;

(4) The findings required for a special use in Chapter 18 are made if the use transferred is a special use in the receiving area;

(5) The approval of affected local governments shall be obtained;

(6) The parcel, or the portion of the parcel, from which the existing development is transferred shall be restricted or retired pursuant to Section 34.5 at the time of commencement of construction of the related project;

(7) All facilities, including building and structures, are found to be appropriate for removal considering conformance with TRPA plans and the Code, such as the provisions for historical structures.

(8) The receiving parcel has a building site that is determined to be in Land Capability Districts



4, 5, 6, or 7; or, if applicable, in the top rank under IPES; and

(9) No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction.

(10) Transfers in accordance with Section 36.4 shall not be subject to the limitation of IPES set forth in subparagraphs (8) and (9) above.

34.4.C Limitations: The following limitations apply to transfer of existing development:

(1) Units of use transferred shall have been legally established.

(2) Transfers of use shall not be permitted for development that has become derelict.

34.5 Restriction Or Retirement Of Parcels: Restriction or retirement of parcels, or portions of parcels, for the purposes set forth in this Code, shall comply with the following requirements:

34.5.A Land Coverage: Parcels from which land coverage has been transferred are subject to provisions of Chapter 20.

34.5.B Allocation Transfer: Parcels from which allocations have been transferred shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.C Existing Development Transfer: For parcels from which units of existing development have been transferred, the structures or facilities accounting for

that use shall be removed or modified and the land restored and maintained in as natural a state as is possible, so as to eliminate the units transferred.

34.5.D Payment Of Bonds: All bonds, assessments, back taxes, fees and liens affecting that portion of a parcel to be retired pursuant to a transfer under this chapter shall be paid in full.

34.5.E Transfer Of All Existing Development From Sensitive Lands: Parcels in Land Capability Districts la, lb, lc, 2, or 3, or SEZ, from which all units of existing development have been transferred, shall be restored pursuant to Subsection 34.-5.C and shall be permanently restricted to open space by Indeed restriction, or other covenant running with land, recorded by the owner.

34.5.F Transfer Of Some Existing Development From Sensitive Lands: Parcels in Land Capability Districts la, lb, lc, 2, or 3, or SEZs, from which less than all units of existing development have been transferred, shall be permanently restricted from transfering development back to the parcel by deed restriction, or other covenant running with the land, recorded by the owner.

34.5.G Transfer Of Existing Development From Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6, or 7, from which units of existing development have been transferred, shall be restricted by deed restriction, or other covenant running with the land, recorded by the owner. The restriction shall limit the units of use to any remaining, until or unless:

(1) A transfer back to the parcel, is approved by TRPA pursuant to this chapter;

(2) An allocation is obtained pursuant to an approved community plan; or

(3) Results in the elimination of nonconforming use.



34.5.H Development Rights Transfer On Sensitive Lands: Parcels in Land Capability Districts la, lb, lc, 2, or 3, or SEE, from which all residential development rights have been transferred, shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.I Development Right Transfer On Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6 and 7, from which all residential development rights have been transferred, shall be restricted to open space by deed restriction, or other covenant running with the land, recorded by the owner, but shall be eligible to receive future transfers of coverage or units of use if otherwise permitted in (1), (2) and (3) of Subsection 34.5.G above.

34.5.J Free Of Nuisance: The sending parcel shall be free of nuisance and hazard.

34.5.K Relation To Chapter 38: TRPA shall record the appropriate changes created by transfers in its records pursuant to Chapter 38.

34.6 Basic Service Requirements: The basic service requirements of Chapter 27 are applicable to a receiving parcel. Approval of a transfer shall not be granted unless the receiving parcel meets those basic service requirements.

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37.3 Procedure For Establishing SEZ Boundaries And Setbacks: The IPES field evaluation teams shall use the following procedures and definitions for purposes of determining the presence and boundaries of an SEZ and establishing SEZ setbacks.

37.3.A Definitions: The definitions are as follows:

(1) Alluvial Soils - All the following soil types owe their major characteristics to the presence of surface or subsurface water:

(a) Loamy alluvial land (Lo)
(b) Elmira loamy coarse sand, wet variant (Ev)
(c) Celia gravelly loamy coarse sand (Co)
(d) Marsh (Mh)
(e) Gravelly alluvial land (Gr)
(f) Fill land (Fd)

(2) Confined - Stream types classified under major categories A and B. and stream type C2, as defined in the report entitled "A Stream Classification System," David L. Rosgen, April, 1985.

(3) Designated Flood Plain - The limits of the Intermediate Regional Flood where established for creeks by the U.S. Army Corps of Engineers, or the limits of the 100-year flood where established for creeks by the U.S. Army Corps of Engineers.

(4) Ephemeral Stream - Flows sporadically only in response to precipitation, with flows lasting a short time.

(5) Groundwater Between 20-40 Inches - Evidence of ground water between 20 and 40 inches below the ground surface (somewhat poorly drained soil).

(6) Intermittent Stream - Flows in response to precipitation or snow melt.

(7) Lake - A water body greater than 20 acres in size, exceeding two meters deep at low water and lacking trees, shrubs, persistent emergents, emergent mosses or lichens with greater than 20 percent aerial coverage.

(8) Man-Made Channel - A channel constructed by man for the purpose of conveying water or a channel created by water being discharged from a man-made source, such as a culvert or pipe.



(9) Near Surface Groundwater - Evidence of ground water within 20 inches of the ground surface (poorly drained soil).

(10) Perennial Stream - Permanently inundated surface stream courses. Surface water flows throughout the year except in years of infrequent drought. Perennial streams shall be those shown as solid blue lines on USGS Quad Maps, or streams determined to be perennial by TRPA.

(11) Pond - A standing water body less than 20 acres in size and/or less than two meters deep at low water.

(12) Primary Riparian Vegetation - The following vegetative community types as identified in the 1971 report entitled Vegetation of the Lake Tahoe Region, A Guide for Planning:"

(a) Type 0: Open water - Open water, Swamps and pools and Vernal pools.
(b) Type 2: Herbaceous - Wet marsh or meadow and Sphagnum bog.
(c) Type 7: Riparian shrub - Willow thicket and Alder thicket.
(d) Type 9: Broadleaf - Low elevations.

(13) SEZ Setbacks - A strip of land adjacent to the edge of a SEZ, the designated width of which is considered the minimum width necessary to protect the integrity of the various characteristic of the SEZ. The width of the setback shall be established in accordance with the procedure set forth in Subsection 37.3.D.

(14) Secondary Riparian Vegetation - The following vegetative types as identified in the 1971 report entitled "Vegetation of the Lake Tahoe Region, A Guide for Planning:"

(a) Type 2: Herbaceous - Wet mesic meadow.
(b) Type 9: Broadleaf - High elevations.
(c) Type 19: Lodgepole - Wet type.

(15) Slope Condition - The condition of the slope located adjacent to the stream channel or edge of the SEZ shall be defined as follows. The extent of existing slope protection, which is defined as the percent cover of original duff layer, down logs, low growing vegetation or rock fragments greater than 1-2 inches in diameter, shall be given primary consideration when determining slope condition.

(a) Good - Slopes show little or no evidence of surface (sheet, rill, gully) erosion or mass wasting. Slopes are typically covered 90 percent or more with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is commonly less than 30 percent. Soil horizons are usually cohesive and consolidated.

(b) Average - Slopes show evidence of surface (sheet, rill, gully) erosion or mass wasting over 5 to 25 percent of the slope surface. Slopes are typically covered between 50 to 90 percent with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is commonly between 30 and 70 percent. Soil horizons are typically moderately cohesive and consolidated.

(c) Poor - Slopes show evidence of active and pronounced surface (sheet, rill, gully) erosion or mass wasting over more than 50 percent of the elope surface. Slopes are typically covered less than 50 percent with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is often greater than 70 percent. Soil horizons are typically non-cohesive and unconsolidated. Evidence of seeping is often present.



(16) Terrace - A moderately flat land area, above the flood plain, generally less than 20 percent slope.

(17) Unconfined - Stream types classified under major categories C (excluding stream type C2), D and E as defined in the report entitled "A Stream Classification System, n David L. Rosgen, April 1985.

37.3.B Identification: A stream environment zone (SEZ) shall be determined to be present if any one of the following key indicators is present or, in absence of a key indicator, if any three of the following secondary indicators are present. Plant communities shall be identified in accordance with the definitions and procedures contained in the 1971 report entitled "Vegetation of the Lake Tahoe Region, A Guide for Planning."

(1) Key Indicators: Key indicators are:

(a) Evidence of surface water flow, including perennial, ephemeral and intermittent streams, but not including rills or man-made channels;
(b) Primary riparian vegetation;
(c) Near surface groundwater;
(d) Lakes or ponds;
(e) Beach (Be) soil; or
(f) One of the following alluvial soils:

(i) Elmira loamy coarse sand, wet variant (Ev).
(ii) Marsh (Mh).

(2) Secondary Indicators: Secondary indicators are:

(a) Designated flood plain;
(b) Groundwater between 20 - 40 inches;
(c) Secondary riparian vegetation;
(d) One of the following alluvial soils:

(i) Loamy alluvial land (Lo);
(ii) Celia gravelly loamy coarse sand (Co); or
(iii) Gravelly alluvial land (Gr).

37.3.C Boundaries: The boundaries of an SEZ shall be the outermost limits of the key indicators; the outermost

limits where three secondary indicators coincide' or, if Lo, Co, or Gr soils are present, the outermost limits where two secondary indicators coincide, whichever limits establish the widest SEZ at any particular point. The outermost boundaries of a stream shall be the bank full width of such stream, which shall be defined as the level of frequent high flow, i.e., the level of flood with a recurrence interval of approximately 1.5 years.

37.3.D SEZ Setbacks: No buildings, other structures or land coverage shall be permitted in SEZ setbacks, except in accordance with Subsection 20.4.B and the exception for the backshore set forth in Subsection 55.4.D. The restoration requirements set forth in Subparagraph 20.4.A(2)(c) shall not apply within SEZ setbacks. The allowable base land coverage within SEZ setbacks shall be in accordance with Subsection 20.3.A, and may be combined with the allowable base land coverage for the remainder of the parcel to establish a total allowable base land coverage. A portion of the total allowable base land coverage for the parcel may be used to allow construction in the SEZ setback only in accordance with Subsection 20.4.B and the exception for the backshore set forth in Subsection 55.4.D. SEZ setbacks shall be established in accordance with the following criteria (see also Section I of the Technical Appendices).

(1) Confined Perennial Stream: When a confined perennial stream is present, the following setbacks shall be established based on the corresponding slope condition:

(a) Good Slope Condition: When the slope condition is identified as good, the setback shall be 25 feet from the edge of the SEZ or is feet from the edge of a terrace, i' present, whichever is less.

(b) Average Slope Condition: When the slope condition is identified as average, the setback shall be 3S feet from the edge of the SEZ or 20 feet from the edge of a terrace, if present, whichever is less.



(c) Poor Slope Condition: When the slope condition is identified as poor, the setback shall be 60 feet from the edge of the SEZ or 35 feet from the edge of a terrace, if present, whichever is less.

(2) Unconfined Perennial Stream: When an unconfined perennial stream is present, the setback shall be 50 feet from the edge of the SEZ.

(3) Confined Ephemeral Or Intermittent Stream: When a confined ephemeral or intermittent stream is present the following setbacks shall be established based on the corresponding slope conditions:

(a) Good Slope Condition: When the slope condition is identified as good, the setback shall be 15 feet from the edge of the SEZ or ten feet from the edge of a terrace, if present, whichever is less.

(b) Average Slope Condition: When the slope condition is identified as average, the setback shall be 25 feet from the edge of the SEZ or 15 feet from the edge of a terrace, if present, whichever is less.

(c) Poor Slope Condition: When the slope condition is identified as poor, the setback shall be 40 feet from the edge of the SEZ or 25 feet from the edge of a terrace, if present, whichever is less.

(4) Unconfined Ephemeral Or Intermittent Stream: When an unconfined ephemeral or intermittent stream is present the setback shall be 2S feet from the edge of the SEZ.

(5) Channel Absent: When there is an SEZ present but there is no associated channel identified, the setback shall be ten feet from the edge of the SEZ.

(6) Lakes and Ponds: Where a lake or pond is present, the SEZ setback shall be 10 feet from the high water line or 10 feet from the edge of the SEZ, whichever

is greater, except where a backshore is established in accordance with Section SS.2 in which case there shall be no SEZ setback established.

37.3.E SEZ Documentation: Where the IPES field team identifies the existence of an SEZ on an individual parcel, it shall prepare a permanent written record or drawing applicable to that parcel showing the boundaries of the 'SEZ, the setback line from the SEZ and setting forth the reasons for its determination. At the time a project is reviewed applicable to a parcel evaluated under IPES as having an SEZ, the SEZ boundaries and setback shall be verified or adjusted based upon additional information then available.

37.4 Area To Be Evaluated: The score received by a parcel shall be based on evaluation of an area established in accordance with the following provisions.

37.4.A Parcels Of 1/3 Acre Or Less: Parcels of 173 acre or less in size shall be evaluated in accordance with the following procedures:

(1) Area To Be Evaluated: The evaluation team shall evaluate the entire parcel, except as provided for under Subparagraph (3), below.

(2) Slope Length And Gradient Readings: Slope length and gradient readings shall be taken in accordance with the following procedures:

(a) Segment readings shall be taken perpendicular to the natural contours and through the middle of the most likely building site as determined by the evaluation team in accordance with Section 37.7;

(b) Enough segments shall be recorded for each parcel so that the sum of all segment lengths is equal to approximately 120 feet. In cases where segment lengths totaling 120 feet can not be obtained within a parcel's boundaries,



segment readings shall be taken on adjacent parcels; and

(c) Segment readings shall begin 60 feet above the middle of the most likely building site or at the top of the cut slope or toe of the fill slope adjacent to the public right-of-way or other access road.

(3) Parcels Containing A SEZ: Where a parcel contains an SEZ, the evaluation team shall evaluate only that portion of the parcel located outside the SEZ. The score received by parcels containing less than 5,000 square feet outside an SEZ shall be multiplied by a factor equal to the area outside the SEZ divided by 5,000 square feet. Parcels containing no area outside an SEZ or SEZ setback shall receive a total score of zero.

(4) Parcels Less Than 10,000 Square Feet Or With Less Than 10,000 Square Feet Outside An SEZ: The score received by parcels that are less than 10,000 square feet in size or with less than 10,000 square feet outside an SEZ shall be multiplied by a factor derived from the equation set forth in Section H of the Technical Appendices.

(a) The score received by parcels that contain less than 5,000 square feet outside an SEZ shall be multiplied by the factors established in Subparagraphs (3) and (4), above.

(b) The procedure set forth in Section 37.3 shall be used by the field evaluation teams to establish the area of a parcel outside a SEZ.

37.4.B Parcels Greater Than 1/3 Acre But Less Than Five Acres: Parcels that are greater than 1/3 acre but less than five acres in size shall be evaluated in accordance with the following procedures:

(1) Area To Be Evaluated: The evaluation team shall evaluate an area of approximately 1/3 acre in size that includes the most likely building site as determined by the evaluation team in accordance

with Section 37.7. In determining the location of the area to be evaluated, the team shall select the 1/3 acre that results in the highest score.

(2) Slope Length And Gradient Readings: Slope length and gradient readings shall be taken in accordance with Subparagraph 37.4.A(2).

(3) Parcels Containing A SEZ: In the case where the best 1/3 acre contains a SEZ the procedures set forth in Subparagraphs 37.4.A(3) and (4) shall be followed.

37.4.C Parcels That Are Five Acres Or Greater: Owners of parcels that are five acres or greater in size shall be contacted by T8PA and asked to identify the location of the 1/3 acre portion of the parcel which includes their desired building site. Once the 173 acre portion has been identified, the evaluation team shall evaluate this portion of the parcel to determine the parcel's score. Slope length and gradient readings shall be taken in accordance with Subparagraph 37.4.A(2) and, if the 1/3 acre contains an SEZ, the procedures set forth in Subparagraphs 37.4.A(3) and (4) shall be followed.

37.5 Evaluation Teams: The members of each evaluation team shall be selected by TRPA and shall consist of professionals in the fields of soil science, hydrology and engineering or planning.

37.6 Eligibility Criteria: Parcels shall be determined to be eligible for evaluation, scoring and ranking under IPES in accordance with the following provisions.

37.6.A Vacant Parcels: Vacant parcels that are permitted a single family dwelling as an allowed or special use in accordance with Chapter 18 shall be eligible, provided the parcel is otherwise eligible under Subsection 37.6.C.

37.6.B Parcels That Are Not Vacant: Parcels that are not vacant and do not contain a single family dwelling shall be eligible as though they are vacant upon receipt by TRPA of a written request by the parcel



owner that the parcel be evaluated and provided the parcel is otherwise eligible under Subsection 37.6.C.

37.6.C Special Situations: In the following special situations, parcels are ineligible, except as otherwise stated.

(1) Right Of Entry: Parcels for which the owner refuses to grant TRPA the right of entry pursuant to Subsection 37.9.A shall not be eligible, unless the owner subsequently grants TRPA the right of entry.

(Certificate of Service by Mail omitted in printing.)

11/23/93

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM, CV-N-91-040-ECR
Plaintiff,
v.

TAHOE REGIONAL PLANNING AGENCY; and STATE of NEVADA,
Defendants.
/

ORDER

Plaintiff Bernadine Suitum alleges that the regulations adopted and implemented by the Tahoe Regional Planning Agency (TRPA) have resulted in a taking of her single-family residential lot in Incline Village without just compensation and due process of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In addition, plaintiff alleges that TRPA's action in this matter constitutes a violation of substantive due process and a denial of equal protection in violation of the Fifth and Fourteenth Amendments. Plaintiff also seeks reimbursements for property taxes and special assessments made on the property. Defendant has moved for summary judgment on all claims (document #69).

Plaintiff has owned the lot at issue since 1972 and became interested in building a single-family home on her lot and obtained a residential allocation for the construction of a house on her lot from Washoe County in 1989. Plaintiff's property is located on what is known as



a "Stream Environment Zone" (SEZ).[1] Such zones are subject to a non-degradation (and restoration) standard due to the integral function they serve in the cleansing of runoff and the achievement of regional water quality goals and standards.[2]

The relevant regulation affecting plaintiff's ability to build is TRPA's 1987 Regional Plan. The plan allows no new land coverage or other permanent land disturbance within stream zones, with very limited exceptions such as for public outdoor recreation facilities and certain public service facilities.

The Individual Parcel Evaluation System (IPES) excludes SEZ's from evaluation or alternatively mandates a score of zero (i.e. a prohibition of new land coverage.)[3] However, under the 1987 Plan, owners of property with a residential development right may transfer such right to another parcel. Plaintiff has not applied to TRPA to transfer from her parcel to another parcel either a residential dwelling unit, land coverage or a development allocation. Defendants claim that the fact that plaintiff has not applied for such a transfer of development rights precludes her from alleging a takings claim at this juncture for lack of ripeness.

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[1] Plaintiff does not argue this categorization.

[2] The parties and Court are well aware of the history, purposes and functions of the TRPA and the interstate compact; it is therefore unnecessary to chronicle these subjects in this order. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1319-1320 (D.Nev. 1992).

[3] It is uncontested that Plaintiff appealed her parcel evaluation (a score of zero) which prohibited her from building on her lot.

With regard to the claim for reimbursement of fees, taxes and assessments (Fifth Claim for Relief) Plaintiff acknowledges that TRPA is not the correct defendant for this claim and the action is dismissed. However, with regard to the remaining claims the threshold issue of ripeness must be decided before proceeding further. The Court is unable to make such a determination of ripeness with the information before it. The only issue in this case is whether or not plaintiff must pursue her development transfer rights in order to present a ripe claim to this Court. The briefings by the parties do not make clear what these rights are or the procedures for obtaining such rights.

The Court understands that plaintiff may not develop or build on the parcel of land she owns and that no developmental rights may be transferred *to* the property at issue. While Defendants correctly assert that the courts have previously listed the application for transfer of development rights as a prerequisite to stating a ripe takings claim, such a prerequisite has always been listed among other avenues that had not yet been pursued by plaintiffs or in our dicta. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 & n.6 (D.Nev. 1986), *vacated in part on other grounds*, 911 F. 2d 1331 (9th Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied* ___ U.S. ___, 111 S. Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992); *Tahoe Sierra Preservation Coun. v. Planning Agency*, 808 F. Supp. 1474, 1483 (D.Nev. 1992) *appeal pending* Ninth Circuit Docket No. 93-15113.

In this case the Court is concerned because the transfer of rights is the *only* avenue not yet pursued, the plaintiff cannot transfer any rights *to* the property at issue,



and there is no evidence of any property appropriate for such transfer. There is also a question as to exactly what rights may be transferred in this case and what benefit or value there is to a transfer. The only development right known to this Court is the allocation right granted by Washoe County.

Defendants claim that an application for transfer is the only "meaningful application" that can be made in this case. This Court would like the "meaningfulness" of this application explained. The question of whether or not a transfer of development rights constitutes a "use" of property can then be determined. An explanation as to how plaintiff can pursue the right to transfer development and how that is meaningful to the use of the property at issue is necessary. The dicta of the numerous cases aside, the Court requests that the parties address this issue specifically in briefs explaining what development rights can be transferred in plaintiff's case and the procedures, prerequisites and value of such transfer as applicable in this case.

IT IS THEREFORE HEREBY ORDERED that the parties shall file concurrent briefs on the issue of the transfer of development rights as applicable in this case (and described in the paragraph above) by December 8, 1993. Concurrent replies shall be filed no later than December 22, 1993.

DATED: November 23, 1993.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE

Gary A. Owen
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Attorneys for Defendant
Tahoe Regional Planning Agency

**Filed 12/08/93**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | | |
|---|---|---|
| BERNADINE SUITUM<br><br>Plaintiff,<br><br>v.<br><br>TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA,<br><br>Defendants. | ) | **CASE NO. CV-N-91-040-ECR**<br><br>**DEFENDANT TAHOE REGIONAL PLANNING AGENCY'S MEMORANDUM CONCERNING ITS TRANSFER OF DEVELOPMENT PROGRAM** |

Defendant Tahoe Regional Planning Agency (TRPA) respectfully submits this memorandum concerning its transfer of development program in response to this Court's order requesting information concerning the program, filed November 23, 1993.

## I

## BACKGROUND

In its order filed November 23, 1993, this Court requested the parties to address what development rights plaintiff Bernadine Suitum (Suitum) can transfer from her property, the procedures and prerequisites for transfer, and the value of such transfer rights.



Order at 5. This memorandum, in response to that order, attaches affidavits, including exhibits, to explain TRPA's Transfer of Development Rights (TAR) program and explore its potential value to a plaintiff such as Suitum. The *actual* benefits of the program for Suitum's property, however, can only be known if she pursues an appropriate application. As a result, there is a measure of inevitable speculation in the information we respectfully submit to this Court.

We trust that nonetheless will assist the Court in better understanding He program at issue.[4]

## II

## TRPA'S PROGRAM FOR TRANSFER OF DEVELOPMEN[T5]

### A

**General.** TRPA's TDR program involves the transfer of land coverage, transfer of residential development rights and residential allocations. *See generally* Barnett Aff. The applicable chapters of the TRPA Code of Ordinances ("TRPA Code") are 20, 21, 34 and 35. Id., ¶ 14. The latter were adopted in May 1987, as a part of TRPA's 1987 Regional Plan, and became effective July 26, 1987. *Ibid.*

Numerous transfers of land coverage, residential development rights and allocations have been approved since implementation

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[4] Because of the length and detail of the affidavits attached to this memorandum, the memorandum itself shall only be in summary form to assist the Court in gleaning the necessary information from the sworn testimony.

[5] The details of TRPA's TDR program are set forth in the Affidavit of Lyn Barnett ("Barnett Aff," attached hereto and incorporated herein as Exhibit "A". Mr. Barnett currently serves as a Senior Planner in TRPA's project review division. Barnett Aff., ¶ 1. He has been employed by the project review division since January 1987 and is familiar with TRPA's transfer rules. *Id.*, ¶12.

of TRPA's 1987 Regional Plan. Barnett Aff., ¶ 12. Applications are routinely processed by TRPA, with transfers conditioned upon permanent retirement of the transferring parcels, such as ones classified as Stream Environment Zone. Retirement is accomplished by deed restrictions or transfers to an entity which will maintain the parcel as permanent open space. Barnett Aff., ¶ 12.

**B.**

**Transfers of Land Coverage.** Under Chapter 20 of the TRPA Code, Suitum is eligible to transfer land coverage from her parcel to a receiving parcel located in the Incline Hydrologic Area, denoted Hydrologic Area No. 1. Barnett Aff., ¶ 5. Classified as Stream Environment Zone, Suitum's parcel is allowed one percent (1 %) land coverage, which will allow her approximately 183 square feet of land coverage eligible for transfer. *Id.*, ¶ 6. The coverage attributable to Suitum's parcel may be transferred to another parcel for a residential, public service or a recreation project in Hydrologic Area No. 1. *Id.*, ¶ 7.

**C**

**Transfers of Residential Development Rights**. Suitum's parcel has been assigned one residential development right under the1987 Plan. Subject to approval by the county and the use and density eligibility of the receiving parcel, that right may be transferred anywhere in the Tahoe region. Barnett Aff., ¶ 8. Certain projects *require* transferred residential development rights. They include duplexes, apartments and other multi-residential projects, as well as guest houses. *Id.*

Under Chapter 35 of the TRPA Code, retirement of a parcel classified as Stream Environment Zone, such as Suitum's, entitles the owner to transfer not only one residential development right but three multi-residential bonus units as well. As a result, a project applicant could purchase four bonus develop rights from Suitum for construction of a multiresidential project on a receiving parcel appropriately zoned for that use. Barnett Aff., ¶ 9.

**D**

**Transfer of Residential Allocations.** Under Chapter 34 of the TRPA Code, Suitum is also entitled to transfer a residential allocation. Barnett Aff., ¶ 10. Subject to county approval and use



and density eligibility of the receiving parcel, residential allocations may be transferred anywhere in the Tahoe Region. Ten percent of Washoe County's residential allocations are reserved for parcels below the IPES line, such as Suitum's. Id., ¶ 11. Six allocations thus will be reserved in Washoe County for parcels below the IPES line. The allocations will be selected through a random drawing. *Ibid.*

## III

## VALUE ATTRIBUTABLE TO TRANSFER RIGHTS[6]

Stephen Johnson's affidavit discusses the value of the transfer rights pertaining to Suitum's property. In addition to the transfer value, the affidavit also considers value attributable to the lot through sale to adjacent property owners for open space and privacy, as well as sale to a governmental entity. (Plaintiff has declined an offer to purchase her property by the State of Nevada for the sum of $35,000.)

The Johnson Affidavit estimates the value of a residential development right as between $1,500 and $2,500. Johnson Aff., Ex. "bb" (third page). Having one residential development right plus three bonus units, Suitum's lot has a development unit transfer value of between $6,000 and $10,000.

Mr. Johnson indicates that land coverage from a zero IPES score lot in Washoe County could be sold for between $6.00 and $12.00 per square foot *Id.* Applying those figures to the 183 square feet available for transfer on Suitum's lot (Barrett Aff.,

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[6] Attached to this memorandum as Exhibit "B" is the Affidavit of appraiser Stephen R. Johnson (Johnson Aff. "). Mr. Johnson has been a member of the American Institute of Real Estate Appraisers since 1976 and a Senior Real Estate Analyst, Society of Real Estate Appraisers, since 1984. Ex. "aa" to Johnson Aff., p.1. He has worked as a real estate appraiser in the Tahoe Region for 24 years. Johnson Aff., p.1. The remainder of his qualifications are set forth on Exhibit "act" to his affidavit.

¶ 6), transfer of the land coverage could produce between $1,098 and $2,196.

Mr. Johnson also states that transfer of Suitum's development right along with a development allocation could potentially produce between $30,000 and $35,000. *See* Johnson Aff., Ex. "bb" (third page).

Finally, once the rights have been transferred from the parcel, Mr. Johnson estimates that lots with zero IPES scores in the Washoe County portion of the Lake Tahoe Basin sell in the range of $7,125 to $16,750. *Id.*, Ex. "bb" (third & fourth pages).

## IV

## CONCLUSION

TRPA respectfully submits its TDR program is a meaningful, realistic course of relief for the plaintiff. Moreover, as the Johnson Affidavit demonstrates, plaintiff's land likely retains significant residual value as an adjunct to the transfer remedies.

Plaintiff ought to be required to pursue the TDR program before the merits of her takings and other claims are adjudicated. Absent that pursuit, the Court will not know the actual economic impact of the contested regulations and their effect on plaintiff's reasonable investment-backed expectations. For example, absent transfer, the Court can only speculate on whether TRPA's regulations have diminished the value of her land and the extent of the diminution if any.[7] Both federal and state courts have recognized that transferable development rights mitigate financial burdens of zoning regulations and must be borne in mind when considering the economic impact of a regulation. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978);

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[7] Even then, it is settled that diminution in value caused by a zoning ordinance does not alone render the measure invalid. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (and cases cited there reflecting substantial reductions in value); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962); *Haus v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).



*Deltona Corp. v. United States*, 657 F.2d 1184, 1192 n. 14 (Ct. Cl. 1981); *American Savings & Loan v. County of Marin*, 653'F.2d 364, 371 (9th Cir. 1981); *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1205 (N.D. Cal. 1988); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484, 495-499, 188 Cal.Rptr. 191 (1982), *appeal denied*, 464 U.S. 805 (1982).

Moreover, absent plaintiff's pursuit of transfer remedies, the Court cannot realistically assess whether and to what extent TRPA's regulations have frustrated her *reasonable* expecations. That simply cannot be known until values attributable to the transfer program are known.

For the foregoing reasons, therefore, we respectfully submit Suitum's takings, substantive due process and equal protection claims are not ripe for adjudication, rendering summary judgment for TRPA in order.

DATED: December 8, 1993.

CROWELL, SUSICH,
OWEN, TACKES, LTD.

By: /s/ Gary A. Owen
Gary A. Owen

Attorneys for Defendant

**EXHIBIT A TO TRPA MEMORANDUM 12/8/93**

**AFFIDAVIT OF LYN BARNETT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I, LYN BARNETT, hereby declare as follows:

1. I am currently employed by the Tahoe Regional Planning Agency (TRPA) as a Senior Planner in the Project Review Division.

2. I have been employed by TRPA in the Project Review Division since January 1987 and as such am familiar with the ordinances and application processes for transfers of land coverage, development rights and allocations and have reviewed and approved applications for such projects.

3. I have read and relied upon that portion of the complaint in Suitum v. Tahoe Regional Planning Agency, Case No. CV-N-91-040-HDM, wherein Mrs. Suitum described her property as APN 130-211-30, located in Incline Village, Washoe County, Nevada, which parcel received an IPES score of zero and is classified as a stream environment zone.

4. Chapters 20, 21, 34 and 35 of the TRPA Code were adopted by the Governing Board at its May 27, 1987 meeting and became effective, pursuant to the terms of the adopting ordinance, Ordinance 87-4, and Article VI(a) of the Compact, sixty days later on July 26, 1987.

TRANSFERS OF LAND COVERAGE

5. Chapter 20 allows a property owner, such as Mrs. Suitum, to transfer the land coverage from her parcel to an eligible receiving parcel in the Tahoe Region. A property owner may only transfer coverage to another receiving parcel within the same hydrologically related area as the sending parcel (see TRPA Code Section 20.3(C)(5)). There are nine hydrologically related areas in the Tahoe Region. This means that a property owner, such as Mrs. Suitum, located in the Hydrologic Area 1 (Incline), is eligible to transfer her coverage to any parcel within the approximately 14,106 acres of the Incline Hydrological Area.

6. The Suitum parcel is claasified as land capability district lb (Stream Environment Zone) by TRPA'a Land Capability System and Individual Parcel Evaluation System. As a stream environment



zone, the property owner is allowed one percent (1%) base coverage. The county assessor records indicate the Suitum parcel is approximately 18,300 square feet in size. This means that Mrs. Suitum has the ability to transfer 183 square feet of coverage (1% of 18,300 square feet) to another parcel for construction of a larger project on the receiving parcel.

7. The amount of coverage which can be transferred to a project depends upon the use classification of the project and the land capability rating of the receiving parcel. TRPA approves transfers of coverage in conjunction with the approval of a project on the receiving parcel. Transfers of coverage are required for certain types of projects such as: 1) Residential projects which exceed the maximum parcel coverage specified in Section 20.3.B(l)(a), 2) Highways, streets, and roada which exceed allowable land coverage limits; 3) Planned unit developments which exceed allowable land coverage limits, as specified in Section 20.3.(B)(l)(b); 4) Driveways which cause the parcel 'e coverage to exceed allowable land coverage limits; and 5) Public works projects which exceed the allowable land coverage limits. The base coverage for vacant parcels, such as Mrs. Suitum's, is termed "potential coverage" became the coverage does not physically exist. Potential coverage may be tranaferred to residential, public service and recreation projects in the cam. hydrologic area t in this instance, Hydrologic Area 1 (Incline). A true and correct excerpt of Section 20.3.C titled Manner of Transferring Land Coverage is attached hereto as Exhibit B "aa".

TRANSFERS OF RESIDENTIAL DEVELOPMENT RIGHTS

8. Chapter 21 (Section 21.6) of the TRPA Code provides for the assignment of residential development rights to vacant parcels existing on the effective date of the Regional Plan, July 1, 1987. Under the Regional Plan, the Suitum parcel is assigned one residential development right. Chapter 34 provides for the transfers of residential development rights in Section 34.2. Subject to County approval and use and density eligibility of the receiving parcel, residential development rights may be transferred anywhere in the Tahoe Region. Transferred residential development rights are required for projects proposing residential density in excess of one residential unit per parcel, such as duplexes, apartments, other multi-residential projects,

and guest houses. A true and correct copy of Section 34.2 is attached hereto as Exhibit "bb..

BONUS RESIDENTIAL RIGHTS

9. Chapter 35 provides for the assignment of bonus residential development rights (known as multi-residential bonus units) to projects which have resulted in the retirement of sensitive parcels, such as abeam environment zones. Retirement of a parcel classified as a abeam environment zone, such as Mrs. Suitum's, qualifies the receiving project for the assignment of three multi-residential bonus units. By transferring a residential development right from a abeam environment zone parcel, such as Mrs. Suitum's, a project applicant would have four bonus development rights (one from the retired parcel and three bonus development rights) for use on an eligible receiving parcel. These four development rights (coupled with the project applicant's four building allocations) would permit project applicant to construct four new residential units in the Tahoe Region. A true and correct copy of Section 35.2 is attached hereto as Exhibit "cc".

TRANSFER OF RESIDENTIAL ALLOCATIONS

10. Chapter 34 also provides for transfer of residential allocations from a parcel with a low IPES score (such as Mrs. Suitum's) to any parcel with an IPES score above 694[1]. Subject to County approval and use and density eligibility of the receiving parcel, residential allocations may be transferred anywhere in the Tahoe Region. Residential allocations are limited to 300 per year in the Tahoe Region and are required for construction of new residential units. A true and correct copy of Section 34.3 is attached hereto as Exhibit "dd".

11. Ordinance 93-19, adopted by the Governing Board at its regular November meeting on November 17, 1993, requires TRPA to reserve ten percent of each jurisdiction's residential allocations for distribution to parcels below the IPES line in that

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[1] The 694 Washoe County IPES line will take effect on February 16, 1994. Until that time, the Washoe County IPES line is set at 725.



jurisdiction. The IPES line in Washoe County is currently 725. This means that a parcel must currently have a score of 726 or better to be eligible for construction. Thia ordinance allows residential parcel owners with parcels below the IPES line, such as Mrs. Suitum, to compete for an allocation. If she were to obtain an allocation, she could transfer the allocation to an eligible receiving parcel. In Washoe County, six allocations will be reserved for allocation transfers in 1994 to parcel with IPES scores below 694. TRPA distributes the residential allocations for parcels below the IPES line through a random drawing of parcels. A similar program was implemented in 1993 pursuant to TRPA Ordinance 92-20 and TRPA Resolution 92-32. A true and correct copy of Ordinance 93-19 is attached as Exhibit "ee".

12. Numerous transfers of coverage, residential development rights and allocations have been approved since the implementation of the 1987 Regional Plan. Such applications can be, and are, made at any time and are routinely processed and approved under the TRPA Code. Transfers are conditioned on the permanent retirement of the sending parcel if the sending parcel is classified as sensitive, such as a stream environment zone parcel. Permanent retirement can be accomplished by such means as deed restrictions or transfer of the parcel to an entity which will maintain the parcel as permanent open apace.

13. A copy of the application form that la used for land coverage transfers, development right transfers and allocation transfers is attached as Exhibit "ff".

14. All of the excerpts of the TRPA Code of Ordinances are public records pursuant to Article III(i) of the Tahoe Regional Planning Compact.

I declare, under penalty of perjury under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Roundhill, Nevada on December 7, 1993.

/s/ Lyn Barnett
Lyn Barnett, Senior Planner

**EXHIBIT "aa" TO BARNETT AFFIDAVIT**

20.3.C Manner Of Transferring Land Coverage: Land coverage transferred to eligible parcels for eligible uses prescribed by Subsection 20.3.B, shall be transferred in the manner set forth in this Subsection. A transfer of land coverage may be from one parcel to another and may occur in connection with TRPA's approval of: a project; a community plan; redevelopment plan; a specific or master plan; or a transfer of coverage program for a subdivision. Transfers shall be recorded in accordance with Chapter 38, shall not result in land coverage on eligible parcels in excess of the maximum amounts prescribed by Subsection 20.3.B, and shall be in accordance with the provisions of this chapter. Transfers may be undertaken in connection with Chapter 34. Removal of existing land coverage without transfer in connection with a project, in the manner and as otherwise required by this chapter, may be accomplished, by crediting the coverage account of the pertinent parcel pursuant to Chapter 38. Land coverage banks may be designated by TRPA pursuant to Chapter 38, which banks may provide a supply of land coverage to accommodate individuals needing coverage for transfer purposes.

(1) Land Coverage Transfer Ratios: Land coverage transferred from one parcel ("sending parcel") to another parcel ("receiving parcel") shall be in accordance with the following ratios:

(a) General: Except for transfers relating to commercial uses within approved community plans, the transfer of one square foot of land coverage to a receiving parcel requires the retirement of one square foot of land coverage on the sending parcel (1:1 transfer ratio).

(b) Commercial Uses Within Approved Community Plans: Receiving parcels within approved community plans, upon which there exist commercial facilities, shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), up to the



maximum 50 percent land coverage prescribed by Subparagraph 20.3.B(2)(b). Undeveloped receiving parcels within approved community plans, eligible for the maximum 70 percent land coverage prescribed by Subpara--graph 20.3.B.2(a), shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), until the total land coverage reaches 50 percent of the project area. Undeveloped parcels shall be eligible to receive additional transferred land coverage in excess of the 50 percent limit, until the total land coverage reaches the maximum 70 percent, provided the additional coverage over 50 percent shall be transferred at the ratio set forth in the following chart:

| Percent of Final Coverage | Transfer Ratio |
|---|---|
| 51 | 1.05:1 |
| 52 | 1.1:1 |
| 53 | 1.15:1 |
| 54 | 1.2:1 |
| 55 | 1.25:1 |
| 56 | 1.3:1 |
| 57 | 1.35:1 |
| 58 | 1.4:1 |
| 59 | 1.45:1 |
| 60 | 1.5:1 |
| 61 | 1.55:1 |
| 62 | 1.6:1 |
| 63 | 1.65:1 |
| 64 | 1.7:1 |
| 65 | 1.75:1 |
| 66 | 1.8:1 |
| 67 | 1.9:1 |
| 68 | 1.95:1 |
| 70 | 2:1 |

Transfer Example:

Five Acre Parcel - 217,800 sq. ft
Allowable Base Coverage = 30% = 65,340 sq. ft.
Proposed Project Coverage = 60% = 130,680 sq. ft.

Transfer Requirement

| | |
|---|---|
| O to 30% - None = | 0 |
| 30 to 50% - 1:1 = | 43,560 sq. ft. |
| 50 to 60% - 1.5:1 = | 32,670 so. ft. |
| Total Coverage to be transfered | 76,230 sq. f t. |

(2) Types Of Land Coverage Eligible For Transfer: The following types or classes of legally established land coverage are eligible for transfer to receiving parcels in accordance with the provisions of this Chapter:

(a) Hard Coverage: Hard land coverage may be transferred in all cases.

(b) Soft Coverage: Soft land coverage may be transferred in all cases, except for transfers relating to commercial or tourist accommodation uses or facilities.

(c) Base Coverage: Unused allowable base land coverage referred to in Subsection 20.3.A may be transferred in all cases, except for transfers relating to commercial uses or facilities. Land coverage transferred as mitigation for excess coverage associated with commercial and tourist accommodation projects shall be existing hard coverage except as provided in Subparagraph 20.3.C(6).

(d) Coverage For Single Family House: Coverage transferred for a single family house, including, but not limited to, a house to be constructed pursuant to IPES, shall be from a sending parcel as environmentally sensitive as, or more environmentally sensitive than, the receiving parcel. If both sending and receiving parcels have not received IPES rating scores, relative environmental sensitivity shall be determined by comparing the land capability classification of each parcel. If both parcels have IPES rating scores, sensitivity shall be determined by comparing the scores of each. If one parcel has an IPES



rating score and the other does not, TRPA shall determine sensitivity.

(e) Coverage for Water Quality Control Facilities: Land coverage transferred for water quality control facilities pursuant to Subsection 20.3.B(8) shall be in acordance with (a) through (c) above, or shall be mitigated through restoration in accordance with Subsection 20.4.C, in the amount of 1.5 times the area of land covered or disturbed for the project beyond that permitted by the coefficients in Subsection 20.3.A.

(3) Sending Parcels Classified As Sensitive Lands (Lands Capability Districts 1-3): If land coverage is transferred from a sending parcel that is located, in whole or in part, in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired in the manner set forth in Subparagraph 20.3.C(7) and may not be returned to the sending parcel.

(4) Sending Parcels Classified As High Capability Lands (Land Capability Districts 4-7): If land coverage is transferred from a sending parcel that is located entirely within Land Capability Districts 4 through 7, inclusive, or is above the initial level defining the top rank under IPES (i.e., 725), land coverage may be returned to the sending parcel subject to the limitations of Subsections 20.3.A and 20.3.B

(5) Hydrologically Related Area Transfer Limitation: For all land coverage transfers, the receiving parcel and the sending parcel shall be in the same hydrologically related area. The hydrologically related area boundaries are depicted upon the TRPA Plan Area Overlays and are incorporated herein. Transfer across said boundaries is prohibited.

(6) Inadequate Supply Of Land Coverage: If TRPA, after conducting a mandatory annual review of the cost of land coverage available at the land bank, finds there is an inadequate supply of hard land coverage for commercial or tourist accommodation uses at a reasonable cost within a given hydrologically related area, TRPA may authorize an increase in the supply of land coverage for transfer in the order of priority set forth below. In determining "reasonable

cost," TRPA shall consider: whether there is no market for the coverage due to its cost, limited supply or simple absence of transactions; and other pertinent factors. Prior to authorizing an increase in supply of land coverage, TRPA also shall consider the effect of the increase on the inventory in the land bank and the value of investments made by the bank in hard or soft land coverage. If TRPA authorizes an increase in the supply of land coverage, it shall do so in the following order of priority:

(a) Existing soft coverage as described in the definition of "land coverage."

(b) Unused base coverage, referred to in the Goals and Policies as "potential coverage."

(c) Through redefinition of the boundaries of the hydrologically related area to increase the supply of coverage.

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provisions for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.



(b) Retirement Of Land Coverage For Credit: In the event land coverage is retired on one parcel, but is not proposed for immediate transfer to another parcel, the applicant shall comply with Subparagraph 20.3.C(7)(a)(i) and (ii), to assure credit for the retired coverage in accordance with Chapter 38.

(8) Land Bank: Land coverage transfers and land coverage retirement programs may use a land bank pursuant to Chapter 38.

**EXHIBIT "bb" TO BARNETT AFFIDAVIT**

CHAPTER 34
TRANSFER OF DEVELOPMENT

Chapter Contents

34.0 Purpose
34.1 Applicability
34.2 Transfer Of Residential Development Right
34.3 Transfer Of Residential Allocations
34.4 Transfer Or Relocation Of Existing Development
34.5 Restriction Or Retirement Of Parcels
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34.0 Purpose: This chapter sets forth the provisions for the transfer of residential development rights, residential allocations, and existing development, from one parcel to another as provided in the Goals and Policies, Development and Implementation Priorities Subelement, Implementation Element, Goal #3, Policies 1 - 5. The transfer of land coverage is addressed in Chapter 20.

34.1 Applicability: This chapter applies to the transfer of residential development rights, residential allocations, and existing development. All such transfers require TRPA approval. Transfer of a residential development right or allocation does not constitute a project approval. Transfers of existing development can occur only in conjunction with a project.

34.2 Transfer Of Residential Development Right: A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;



34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or community plan where residential uses are permissible and shall meet the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance

districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transferred.



**EXHIBIT "cc" TO BARNETT AFFIDAVIT**

CHAPTER 35

BONUS UNIT INCENTIVE PROGRAM

Chapter Contents

35.0 Purpose
35.1 Applicability
35.2 Multi-Reeidential Incentive Program
35.3 Tourist Accommodation Bonus Unit Program
35.4 Determination of Project Cost

35.0 Purpose: This chapter sets forth provisions for assigning multi-residential and tourist accommodation bonus unite in accordance with the Goals and Policies, Land Use Element, Land Use Subelement, Goal #2, Policies SA and 5B, and Implementation Element, Development and Implementation Subelement, Goal #2, Policies 2F and 3, and Goal #3, Policies 1 and 2.

35.1 Applicability: The assignment of mplti-residential and tourist accommodation bonus units shall comply with the provisions set forth in this chapter. Such assignments shall occur only in conjunction with a project approved by TRPA.

35.2 Multi-Residential Incentive Program: Multi- residential bonus units may be approved for use only on parcels located in plan areas or community plane designated as eligible for the Multi-Residential Incentive Program.

35.2.A Assionment Of Bonus Units: Pursuant to Chapter 13, a maximum of 1,600 multi-residential bonus units shall be assigned to plan areas.

35.2.B Criteria: All projects receiving multi-residential bonus units pursuant to this chapter shall comply with the following criteria:

(1) The proposed density, including any multi-residential bonus units, shall not exceed the maximum density limits set forth in the plan area statement, applicable community or redevelopment plan, or this Code.

(2) Multiple family dwellings shall be designated in the plan area or community plan as an allowed use, or a special use for which the findings required in Section 18.1 have been made.

(3) The project shall be located within a plan area or community plan designated as eligible for the Multi-Residential Incentive Program.

(4) The multi-residential bonus units received by the project shall not exceed the number of multi-residential bonus units assigned to the plan area or community plan in which the project is located.

(5) Except for affordable housing units, an allocation shall be required pursuant to Chapter 33 in order to utilize multi-residential bonus units.

35.2.C Determination Of The Number Of Bonus Units: Applications for projects proposing the use of residential bonus units shall include a list and description of all mitigation measures identified in Subsection 35.2.D that are proposed as part of the project. Based on review of the list and description of the mitigation measures proposed, TRPA shall determine a score for the project in accordance with Subsection 35.2.D. One residential bonus unit may be approved for each ten points received by a project. Bonus units, so determined, may be reserved for projects based on the proposals submitted prior to project approval to enable applicants to accumulate allocations. Bonus units shall be assigned to a parcel and may be reserved as credits, unused, for no more than five years. TRPA may reissue those credits to the same parcel for an additional five years, if TRPA finds that the bonus units are likely to be used during that period.

(1) Projects Within A Community Plan: The score received pursuant to Subsection 35.2.D by projects located within an approved community plan shall be multiplied by a factor of 1.5; or



(2) Projects Providina Affordable Emolovee Housing: The score received pursuant to Subsection 35.2.D by projects designed to provide affordable employee housing shall be multiplied by a factor of 2.0.

(3) Post-1987 Projects Pronosina Subdivision of Units: In order to subdivide a post-1987 multi-residential project which does not meet the standards for low cost housing as defined in Subsection 41.2.F, the score received pursuant to Subsection 35.2.D shall be multiplied by a factor of .67.

35.2.D Mitigation Measures: Projects proposing the use of multi-residential bonus units shall receive a score only when one or more of the following mitigation measures are proposed as part of the project. Any combination of the listed measures may be proposed. Only those mitigation measures that would not otherwise be required by the Code shall be considered in determining the score received by a project. This subsection establishes the maximum number of points that may be awarded for each mitigation measure. When a mitigation measure satisfies the requirements of two or more of the mitigation measures listed below, points shall be awarded based on the mitigation measure resulting in the highest score. The total point score shall be rounded down to a number which is a multiple of ten.

(1) Participation in a Capital Improvements project included in the Action Element of TRPA's Regional Transportation Plan-- (project cost divided by $5,000) x 10 points.

(2) Participation in a Capital Improvements project included in TRPA'a Water Quality Management Plan--(project coat divided by $5,000) x 10 points.

(3) Provision of stream zone restoration pursuant to TRPA's Stream Environment Zone Restoration

Program (excluding restoration required as mitigation for new SEE disturbance)--(project cost divided by $5,000) x 20 points.

(4) Retirement, in accordance with Chapter 34, of an undeveloped parcel located in Land Capability Districts 1a, 1b (SEZ), 1c, 2, or 3:

(a) If the parcel is in Land Capability Districts la, lo, 2, or 3--10 points per transferred unit.

(b) If the parcel is in Land Capability District 1b or in a stream environment zone--30 points per transferred unit.

(5) Transfer of existing residential unit and retirement of the parcel in accordance with Chapter 34:

(a) If the parcel is in Land Capability Diatricts la, lo, 2, or 3 - 10 points per transferred unit.

(b) If the parcel is in Land Capability District lb or in a stream environment zone - 40 points per transferred unit.

(6) Provision of public access to recreation arena, lakes, streams, or vista points to which access was previously nonexistent - (project cost divided by 55,000) x 10 points (maximum 50 points).

(7) Projects proposing leea land coverage than the maximum amount otherwise allowed in accordance with Chapter 20 shall receive one point for each such reduction of 600 square feet onsite.

(8) Participation in projects identified in the TRPA approved Scenic Restoration Program - (project coat divided by S5,000) x 10 points.

35.2.E Affordable Housing: Housing meeting the criteria for affordable or government assisted housing as set forth in policies 1, 3 and 4 of Goal 1 of the Housing



Subelement are not subject to 35.2.D. Bonus units for such projects are assigned on the brain of project need.

**EXHIBIT "dd" TO BARNETT AFFIDAVIT**

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance districts 1, 2, 3, or 4; below the top rank IPES line if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transfered.



**EXHIBIT "ee" TO BARNETT AFFIDAVIT**

TAHOE REGIONAL PLANNING AGENCY
ORDINANCE NO. 93-19

AN ORDINANCE AMENDING ORDINANCE NO. 87-9, AS AMENDED, OF THE TAHOE REGIONAL PLANNING AGENCY; AMENDING CHAPTER 33 OF THE CODE OF ORDINANCES RELATING TO DISTRIBUTION OF ALLOCATIONS TO PARCELS BELOW THE IPES LINE; AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

The Governing Board of the Tahoe Regional Planning Agency does ordain as follows:

Section 1.00 Findings

1.10 It is necessary and desirable to amend TRPA Ordinance No. 87-9, as amended, by amending Chapter 33 of the Code of Ordinances relating to distribution of residential allocations to parcels below the IPES line in order to further implement the Regional Plan pursuant to the Goals and Policies Plan, Goal #3, Policy 4, Development and Implementation Priorities Subelement, and Article VI(a) and other applicable provisions of the Tahoe Regional Planning Compact.

1.20 The Advisory Planning Commission ("APC") conducted a public hearing and recommended adoption of the amendments. The Governing Board has also conducted a noticed public hearing on the amendments. Oral testimony and documentary evidence were received and considered.

1.30 The proposed amendments have been determined not to have a significant effect on the environment and are exempt from the requirement of an environmental impact statement pursuant to Article VII of the Compact.

1.40 The Governing Board finds that, prior to the adoption of this ordinance, the Board made the findings required by Section 6.5 of the Code and Article V(q) of the Compact.

1.50 The amendments adopted by this ordinance continue to implement the Regional Plan, as amended, in a manner that attains and maintains the environmental thresholds as required by Article V(c) of the Compact.

1.60 Each of the foregoing findings is supported by substantial evidence in the record.

Section 2.00 Amendment of Chapter 33 of the Code

Subparagraphs (a), (c) and (d) of Subsection 33.2.B(1) are hereby amended with added language underlined and deleted language stricken as follows:

(a) TRPA shall reserve 10 percent of each jurisdiction's ~~1993~~/1994 allocations for distribution to parcels below the IPES line. The reserved allocations shall be distributed by a method of random selection by TRPA. A county or city may elect to distribute the reserved allocations provided TRPA fends the substitute system provides for an equal or superior opportunity for participation of parcels below the IPES line.

(c) A complete application for transfer of a reserved allocation shall be filed no later than June 1, ~~1993~~/1994. Transfers of allocations shall be deemed complete when the applicant has received a TRPA notice of eligibility for the transfer and the original allocation form has been signed by the owners of the transferor and transferee parcels, and TRPA. The signatures of the receiving and sending county or city shall be required for interjurisdictional transfers.

(d) Upon transfer of a reserved allocation, a complete application for an additional residential unit shall be filed no later than December 31, ~~1993~~ /1994. Failure to submit a complete application for transfer by June l, ~~1993~~/1994 or to file a complete application for a new residential unit by December 31, ~~1993~~/1994 shall result in the forfeiture of the allocation to the Jurisdiction of origin.

Section 3.00 Interpretation and Severability

The provisions of this ordinance and the amendments to the Code adopted hereby shall be liberally construed to effect their



purposes. If any section, clause, provision or portion of this ordinance or the amendments adopted hereby is declared unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance or the amendments shall not be affected. For this purpose, the provisions of this ordinance and the amendments are hereby declared respectively severable.

Section 4.00 Effective Date

This ordinance shall become effective 60 days after its adoption.

PASSED and ADOPTED by the Governing Board of the Tahoe Regional Planning Agency at a regular meeting held November 17, 1993, by the following vote:

Ayes: Mr. Klein, Ms. Lau, Mr. Sevison, Mr. Bradhurst, Ms. Neft, Mr. DeLanoy, Mr. Waldie, Ms. Bennett, Ms. Hagedorn, Mr. Cronk, Mr. Westergard, Mr. Upton, Mr. Kanoff, Mr. Chimaruati

Nays: None

Abstentions: None

Absent: None

/s/ Wayne Chimarusti
Wayne Chimarusti, Chairman
Tahoe Regional Planning Agency

(Certificate of Service by Mail omitted in printing.)

**EXHIBIT "ff" TO BARNETT AFFIDAVIT 12/9/93**

**TAHOE REGIONAL PLANNING AGENCY**

P.O. Box 1038
195 U.S. Highway 50 Zephyr Cove, Nevada (702) 588-4547
Round Hill, Zephyr Cove, Fax (702) 588-4527
NV 89448-1038

Type of Transfer (Check Applicable Box)

__ Land Coverage Transfer
__ Existing Development Transfer (improved parcel)
__ Development Right Transfer (unimproved parcel)
__ Allocation Transfer

TRANSFER DESCRIPTION:

FROM (sending parcel): _____
(APN)

TO (receiving parcel) _____
(APN)

(If more than one receiving parcel list in comment section.)

OWNER(S) OF RECORD (sending parcel):

Name(s): _____
Phone: _____

Mailing Address: _____ City: _____
State: ___ Zip: _____

OWNER(S) OF RECORD (receiving parcel):

Name(s): _____
Phone: _____

Mailing Address: _____ City: _____
State: ___ Zip: _____

PERSON AUTHORIZED TO REPRESENT THE TRANSFER AND TO WHOM ALL CORRESPONDENCE IS TO BE SENT:

Name(s): _____
Phone: _____

Mailing Address: _____ City: _____
State: ___ Zip: _____



LOCATION OF PROPERTY: (Stake property corners of sending and receiving parcels and provide location maps as necessary)

SENDING PARCEL:

County: _____ Subdivision: _____
Lot #: _____

Street: _____
Adjacent parcel Addresses: _____

RECEIVING PARCEL:

County: _____ Subdivision: _____ Lot #: _____

Street: _____
Adjacent parcel Addresses: _____

PROPERTY RESTRICTIONS (List any deed restrictions, easements or other restrictions on property):

Sending Parcel: _____

_____

___

Receiving Parcel: _____

_____

___

PRIOR APPROVALS: (List any prior local or CTRPA/TRPA approvals/permits received for the subject property):

Sending Parcel:

Agency: _____ Permit Type: _____
Date: _____ Permit # _____

Agency: _____ Permit Type: _____
Date: _____ Permit # _____

Receiving Parcel:

Agency: _____ Permit Type: _____
Date: _____ Permit # _____
Agency: _____ Permit Type: _____
Date: _____ Permit # _____

Is the sending parcel free of nuisance and hazard (i.e., foundations, excavations, spoil piles)? _____ If no, please describe in comment section.

Does the receiving parcel meet the basic service requirements of Chapter 27 of the TRPA Code of Ordinances including but not limited to: 1) served by paved roadway; 2) adequate water rights and water supply system; 3) sewer service; and 4) electrical service? _____
If no, please describe in comment section.

Existing Land Coverage:

Sending Parcel
_____ Square Feet of Hard Coverage
Sending Parcel
_____ Square Feet of Soft Coverage (dirt roads, paths, and parking)

Existing and Proposed Uses of Property:

Sending Parcel

_____
_____

Receiving Parcel _____

_____ _____

Amount of Land coverage to be transferred (if applicable):
_____



Comments:

_____
_____
_____

I hereby declare under penalty of perjury that this application and all information submitted as part of this application, are true, complete, and accurate to the best of my knowledge. Should any information or representation submitted in connection with this application be incorrect or untrue, I understand that TRPA may rescind any approval, or take other appropriate action.

Signed _____

At _____ Dated _____
(Property owner(s)) (County)

AUTHORIZATION FOR REPRESENTATION:

The following person(s) is owner of the subject property (APN _____) or of a sufficient interest therein to make this application:

(Print Owners(s) name(s) _____

_____

If the applicant is not the sole owner of the property, list the names and addresses of the owners and the legal relationship of the applicant to the owner(s) that entitles the applicant to make this application.

_____

_____

As such he/she/they authorize _____
to act as his/her/their representative in connection with this application for the subject property and agree to be bound by said

representative. Any cancellation of this authorization shall not be effective until receipt of written notification of same by TRPA I understand that if this project is approved that I, as the permittee, will be held responsible for any and all permit conditions.

REQUIREMENTS FOR COMPLETE APPLICATION:

_____ _____
Owner's Signature Date

____ 1. Completed Application Form

____ 2. Application Fee

____ 3. Site Plan (if transferring existing coverage)

---

FOR OFFICE USE ONLY

Date Received: _____
By: _____

Complete Application: _____
By: _____

$240
Filing Fee: [redacted]: _____
Receipt #: _____



**EXHIBIT B TO TRPA MEMORANDUM**

**AFFIDAVIT OF STEPHEN R. JOHNSON IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT**

I, Stephen R. Johnson, hereby declare as follows:

1. I am currently a shareholder with Johnson-Wright & Associates, as a professional real estate appraiser.

2. For twnty-four (24) years I have worked as a real estate appraiser in the Tahoe region.

3. I am a certified appraiser in the states of Nevada and California, and my qualifications are set forth in Exhibit "aa," attached hereto and incorporated herein by reference.

4. I am professionally qualified to evaluate and appraise the value of, and the marketability of coverage transfers, allocations and bonus units in the Tahoe area.

5. The December 3, 1993 four page letter addressed to Mr. Gary Owen, Attorney at Law, that is attached hereto as Exhibit "bb", and referenced as though fully set forth herein, reflects my professional judgement on this matter.

I declare, under penalty of perjury under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Roundhill, Nevada on December 4, 1993.

/s/ Stephen R. Johnson
Stephen R. Johnson, MAI, SREA
Nevada Certified General
License #00003

## QUALIFICATIONS OF APPRAISER
STEPHEN R JOHNSON

**Professional Designations**

MAI - Member American Institute of Real Estate Appraisers - 1976 (Certified through 1992)

SREA - Senior Real Estate Analyst; Society of Real Appraisers - 1984 (Certified through 1994)

**State Licensing and Certification**

Certified General Appraiser-State of Nevada License #00003 (Certified through 1993) — 1991

**Association Memberships and Affiliations**

Member Reno Board of Realtors
Member Nevada Association of Realtors
International Right-of-Way Association
Member Nevada State Board of Equalization - (Appointed by Governor Richard Bryan, January 1984 & 1988) — 1984-1991
Member Nevada Commission of Appraisers of Real Estate - (Appointed by Governor Bob Miller, August 7, 1989) — 1989-1991

**Offices Held**

President, Sierra-Nevada Chapter #60, AIREA - 1989
Vice President, Sierra-Nevada Chapter #60, AIREA - 1988
Secretary; Sierra-Nevada Chapter #60, AIREA - 1987
Vice Governor District 3 (Northern California & Nevada) Society of Real Estate Appraisers (SREA) - 1980-1981
Past President & Membership Chairman - Reno/Carson/Tahoe Chapter #189

**Offices Held**

Member 1976 Young Men's Council, SREA, Atlanta, Georgia



Discussion Leader 1977 Young Men's Council, SREA, Las Vegas, Nevada
Elected 1 of 2 National Representatives to the International Board of Governors of the SREA, representing the Young Men's Council - 1977
International Professional Practice Committee, SREA - 1978-1981
International Conference Committee, SREA - 1978 & 1979
National Candidates Guidance Committee of the American Institute of Real Estate Appraisers (AIREA) - 1978-1981
Chairman National Division of Member and Chapter Services, AIREA 1981
Board of Directors Northern California Chapter #11, AIREA -1 1980
Admissions Committee, Sierra-Nevada Chapter #60, AIREA
Board of Directors, Sierra-Nevada Chapter #60, AIREA 1984-1986
Board of Directors, Reno-Carson- Tahoe Chapter

**Appraisal Experience**

Independent Fee Appraiser - 1976 to present
President, Johnson - Wright & Associates (Staff of 11 Appraisers)
Alves Appraisal Associates - 1972-1976
Alves-Kent Appraisal Associates - 1970-1972

**Qualified as an Expert Witness**

Nevada District Courts:
Washoe County, Carson City,
Douglas County, and Elko County
U.S. Bankruptcy Courts:
Reno, Las Vegas, Sacramento, and Los Angeles
U.S. District Court, San Francisco, California
United States Tax Court
Arizona Superior Court, Maricopa County, Phoenix
Douglas County Board of Equalization
Washoe County Board of Equalization
Nevada State Board of Equalization :
King County Superior Court, Seattle, Washington

**Formal Education**

Reno High School Graduate - 1966
Bachelor of Science Degree in Business Administration
Majoring in Real Estate, from the University of
Nevada, Reno

**Appraisal Education**

University of Nevada:
B.A. 430 Real Estate Evaluation
B.A. 432 Real Estate Appraisal Problems 1971
American Institute of Real Estate Appraisers:
Course 1A Basic Appraisal Principles, Methods
& Techniques, San Francisco, CA 1972
Course 1B Capitalization Theory <it Techniques,
San Francisco, California 1973
Course 2 Urban Properties,
San Francisco, California
Course 6 Investment Analysis,
Memphis, Tennessee 1976
Society of Real Estate Appraisers:
Course 301 Special Applications of Appraisal
Analysis, Pomona, California 1974
Numerous Continuing Education Seminars and Courses

**Appraisal Instructor**

Nevada Association of Realtors



Department of Commerce, Real Estate Division,
State of Nevada
Appraisal "A" Residential Appraising
Appraisal "B" Apartment and Commercial
Property Appraising
Western Nevada Community College
R.E. 206 Real Estate Appraising
Northern Nevada Real Estate School
Real Estate Appraisal

**QUALIFICATIONS OF APPRAISER**
**STEPHEN R JOHNSON**
**REPRESENTATIVE APPRAISAL**
**CLIENTS AND PROPERTIES**

- CITY OF RENO
- CITY OF SPARKS
- CARSON CITY
- DOUGLAS COUNTY
- LINCOLN COUNTY
- LYON COUNTY
- MINERAL COUNTY
- WASHOE COUNTY
- NEVADA STATE PARK SYSTEM
- NEVADA STATE HIGHWAY DEPARTMENT
- NEVADA STATE DIVISION OF LANDS
- NEVADA ATTORNEY GENERAL'S OFFICE
- U.S. DEPARTMENT OF NAVY
- U.S.. FOREST SERVICE
- FNMA - REGIONAL OFFICE
- INTERNAL REVENUE SERVICE
- FEDERAL TRADE COMMISSION
- WASHOE COUNTY REGIONAL TRANS.
- AIRPORT AUTHORITY OF WASHOE CTY
- PLAZA RESORT CLUB
- J.R.B. DEVELOPMENT COMPANY
- JONNY RIBEIRO BUILDER
- KEEVER CONSTRUCTION COMPANY
- SIERRA PACIFIC POWER COMPANY
- TWIN CITY INDUSTRIAL PARK
- MCCARRAN DUNN IND. PARK
- TREADWAY PARK PROF. CENTER
- NORTH FOOTHILL APARTMENTS
- MEADOWOOD APARTMENTS
- SIERRA WOODS APARTMENTS
- AMESBUFY PLACE APPARTMENTS
- SUNDANCE APARTMENTS
- KEYSTONE SQUARE SHOPPING CTR.
- POZZI MOTORS
- CARS0N CITY
- DATSUN-AMC-JEEP
- TAHOE REGIONAL PLANNING AGENCY



- TAHOE REGIONAL PLANNING AGENCY
- CALIFORNIA ATTY GENERAL'S OFF.
- NEVADA NATIONAL BANK:
- SECURITY PACIFIC BANK - NEVADA
- SECURITY BANK OF NEVADA
- PRIMERIT BANK
- VALLEY BANK OF NEVADA
- BANK OF AMERICA
- THE BANK OF CALIFORNIA
- CROCKER NATIONAL BANK
- WELLS FARGO BANK
- FIB TRUST DEPARTMENT
- B OF A TRUST DEPARTMENT
- FIRST FEDERAL SAVINGS & LOAN
- FIRST WESTERN SAVINGS & LOAN
- AMERICAN SAVINGS AND LOAN
- NEVADA SAVINGS & LOAN
- THE COLDWELL COMPANY
- DILORETO CONST. & DEVELOPMENT
- DERMODY PROPERTIES
- TRAMMELL CROW CO.
- MCKENZIE PROPERTIES
- CALIFORNIA ATTY GENERAL'S OFF.
- NEVADA NATIONAL BANK:
- SECURITY PACIFIC BANK - NEVADA
- SECURITY BANK OF NEVADA
- CHEMETRO
- CITY SERVICES MINERAL CO
- SUPERIOR OIL COMPANY
- TRAVELERS INSURANCE
- FARMERS INSURANCE COMPANY
- FIRST AMERICAN TITLE CO. OF NV
- MERRILL LYNCH RELOCATION
- YOUNG ELECTRIC SIGN COMPANY
- SUGAR BOWL SKI RESORT
- SKI INCLINE RESORT
- KIRKWOOD ASSOCIATES
- NORTHSTAR
- AMFAC MORTGAGE COMPANY
- FRONTIER SAVINGS & LOAN
- HEART FEDERAL SAVINGS & LOAN
- LEWIS HOMES OF NEVADA
- SQUAW VALLEY U.S.A

December 3, 1992

Mr. Gary Owen, Attorney at Law
Crowell, Susich, Owen & Tackes, Ltd
P.O. Box 1000
Carson City, NV 98702

Re: Value Potential for Vacant Single Family Residential Parcels with IPES Scores of zero located in the Washoe County portion of the Lake Tahoe Basin

Dear Mr. Owen:

This letter is in response to your request for a preliminary valuation consultation of the potential value inherent in the transfer of development rights in vacant single family residential lots in the Washoe County portion of the Lake Tahoe Basin with IPES scores of zero.

According to information received from the Tahoe Regional Planning Agency, a vacant single family residential lot with a zero IPES score has one inherent development right and land coverage in the amount of 1% of its total land area. Also, the owner of a zero IPES score parcel is eligible to compete for a building allocation through a program administered by the Tahoe Regional Planning Agency in which owners of vacant family lots are eligible to apply for a limited number of buildings reserved for parcels with IPES scores below the demarcation line. Also, the possibility exists to transfer the existing rights from the IPES score lot to another lot. In order to transfer all the development rights from the parcel, the parcel must be greenbelted by the recordation of an open space easement across the parcel. Should the owner of a zero IPES score lot elect to transfer the existing rights from the parcel to another parcel and greenbelt his lot, the buyer of the rights is eligible to receive 30 bonus points which equates to three bonus units. Finally, the owner of the greenbelled vacant lot is eligible to sell the lot to any number of agencies including the U.S. Forest Service and the State of Nevada or a private party. These lots are attractive to adjacent



property owners as they provide additional open space and privacy.

In summary, a zero IPES score vacant single family parcel in the Lake Tahoe Basin has one development right and 1% of its total land area in land coverage. Also, the owner is eligible to compete for a building allocation as well as receive three units upon retirement of the lot. Finally, the owner of the greenbelted lot has the option to sell his lot to a number of agencies or to a private party.

In order to arrive at an indication of an appropriate value for a vacant single family residential lot in the Washoe County portion of the Lake Tahoe Basin with a zero IPES score, these appraisers reviewed sale data in our files, contacted various Realtors in the Lake Tahoe Basin who are familiar with the transfer of development rights, and spoke with various representatives of the Tahoe Regional Planning Agency.

Residential development rights are eligible to be transferred from county to county within the Induce Tahoe Basin. According to information received i;ihese appraisers, a development right in the Washoe County portion of the Lake Tahoe Basin is currently worth approximately S2,500. However, the Washoe County development rights have in the past competed with development rights transferred to Washoe County from Placer County which were selling at approximately $1,500 per right. Additionally, development rights in the South Lake Tahoe portion of the Intake Tahoe Basin are currently selling for approximately $1,500. Based upon this it is these appraisers' opinion that a devleopment right has a value of between $1,500 and $2,500.

Additionally, small amounts of coverage in the Washoe County portion of the Lake Tahoe Basin have recently sold for between $6.00 and $12.00 per square foot. It is these appraisers' understanding that coverage transferred from one lot to another must be transferred from a lot with a lower IPES score to a lot with a higher IPES score. Because this letter addresses the value of coverage coming from a vacant lot with an IPES score of zero, it is our opinion that the possibility exists that a premium might be paud for coverage from a zero IPE5 score lot. However, these appraisers are unaware of any recent coverage sales in excess of $12.00 per square foot. Based upon this analysis, it is our opinion that the coverage from zero IPES score lot in the Washoe County

portion of the Lake Tahoe Basin could be sold for between $6.00 and $12.00 per square foot.

Assuming the owner of the property was in possession of a Washoe County building allocation, the allocation could be transferred to another parcel in Washoe County. The transfer of a building allocation involves retirement of the donor lot. As another alternative, the owner of a zero IPES score lot with a Washoe County building allocation could opt to sell the allocation and the development right together. These types of transfers have occurred for between $30,000 and $35.000.

Finally, once the development rights have been transferred from the zero IPES score lot and the lot has been greenbelted, the owner of the property might wish to sell the lot to various agencies or to a private party. Based upon information received by these appraisers, greenbelted lot sales for typical County portion of the Lake Tahoe Basin range from $7,125 to $16,750.

It has been a pleasure serving you in this assignment. Should you have questions or wish to discuss this letter, kindly contact us.

Respectfully submitted,

/s/ Stephen R. Johnson
Stephen R. Johnson, MAI, SREA
Nevada Certified General
License #00003

/s/ Lynn Barnett-Burton
Lynn Barnett-Burton
Real Estate Appraiser
Nevada Real Estate Intern
License #00261

SRJ/LBB:sh



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Telephone: (702) 334-4444
Attorney for Plaintiff

**Filed 1/19/94**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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| BERNADINE SUITUM, | ) | Case No. CV-N-91-040-ECR |
| | ) | |
| Plaintiff, | ) | DECLARATION OF |
| | ) | PAUL KALETA IN SUPPORT OF |
| vs . | ) | PLAINTIFF'S |
| | ) | RESPONSE TO DEFENDANT |
| TAHOE REGIONAL | ) | TAHOE REGIONAL PLANNING |
| PLANNING AGENCY; and | ) | AGENCY'S MEMORANDUM |
| STATE OF NEVADA. | ) | CONCERNING ITS TRANSFER |
| | ) | OF DEVELOPMENT PROGRAM |
| Defendants. | ) | |
| | ) | |

Attached hereto as Exhibit A is the original Declaration of Paul Kaleta which was attached in facsimile form to Plaintiff's Response to Defendant Tahoe Regional Planning Agency's Memorandum Concerning its Transfer of Development Program filed on January 7, 1994.

DATED this 18th day of January, 1994.

/ss/WM. PATTERSON CASHILL, ESQ.
WM. PATTERSON CASHILL, ESQ.

Attorney for Plaintiff

(Certificate of Service omitted in printing.)

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410 California Avenue
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Telephone: (702) 334-4444
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | | |
|---|---|---|
| BERNADINE SUITUM, Plaintiff, vs. TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA. Defendants. | ) | Case No. CV-N-91-040-ECR **DECLARATION OF PAUL KALETA** |

I, Paul Kaleta, hereby declare as follows:

1. I was previously employed by the Tahoe Regional Planning Agency (TRPA) as a Senior Planner in the Project Review Division. This employment occurred for over five years from the fall of 1984 to the spring of 1990. Since that time I have been employed full time as a land use planning consultant with Basin Strategies - Land Use Planning and Consulting. In this capacity, I am familiar with TRPA ordinances and application procedures for transfer of all land development commodities created by TRPA. When employed by the TRPA, I also reviewed and approved many applications for such projects. Additionally,



as a private land use planning consultant I have in-depth experience facilitating Tahoe Basin property owners in their attempt to transfer and receive compensation, and establish values for their TRPA development commodities. Thus, I have handled transfer of development rights both from the TRPA's and private sector's point of view.

2. I am familiar with Ms. Suitum's property with respect to the availability of all of the development commodities referenced in Mr. Lyn Barnett's affidavit dated December 7, 1993. In large part, I agree with the information presented in the fourteen paragraph affidavit as it concerns identifying the potential available development commodities on the above referenced property. However, I disagree with the subsequent claims made by TRPA legal counsel and the appraisal firm of Johnson-Wright and Associates regarding the value of these development commodities and the procedures and prerequisites for their transfer.

3. I maintain it is not necessary for Mrs. Suitum to make application for the transfer of these rights to determine the actual benefits of the program. As I will demonstrate, there is little to no value to these rights at the present time as there is either no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right.

4. The highest value estimated for any particular development commodity for the Suitum property was 830,000 to $35,000 for the development allocation. This value is inappropriate for the following reasons:

A. 1993 was the first year this parcel was eligible for receiving a building allocation consistent with TRPA's Ordinance 93-19. Previous to this past year, and since the adoption of the TRPA General Plan in 1987, this option was not available to the property owner. Indeed, only thirty such allocations were available to the thousands of unbuildable lots in the Basin. Therefore the probability of receiving an allocation is so minuscule as to be inconsequential. That neither the TRPA nor Mr. Johnson has cited to an actual comparable transaction is telling.

B. All of the six allocations issued to Washoe County property owners under this program in 1993 were returned back

to Washoe County because there was no market for the transferable allocations and they could not be sold. The market value for allocations could more correctly be considered to be zero, not $30,000 to $35,000 as stated by Mr. Johnson. Once again, the fact that Johnson-Wright and Associates do not cite any comparable transactions points out the illegitimacy of their valuation.

C. TRPA is trying, unsuccessfully, to create a market for these transferable allocations, however, new construction market factors will not allow it.

I have discussed these matters with Ms. Romany Woodbeck of the Washoe County Planning Department, who oversees the transfer program for Washoe County. She affirms that no transfers occurred in 1993.

5. TRPA and Johnson-Wright and Associates maintained the second highest value to the Suitum property was a sale to an adjacent property owner once the development rights were transferred. Johnson-Wright and Associates maintain that the adjacent property owner would pay $7,000 to $17, 00 for the 6 privilege of additional privacy. This is nonsense. Any sophisticated adjacent property owner must realize that when TRPA 8 assigns a zero IPES score to a residential property, it is undeniably and irreversibly considered permanent open space forever. No property owner would pay $7,000 to $17,000 for an empty lot that the government has effectively condemned by allowing no use of the land. The adjacent property owner could not even place a picnic table, dog house or garden on the referenced property as these structures would either create land coverage or disturb existing natural riparian vegetation.

I believe Johnson-Wright and Associates estimate of residual value could only have been derived from properties that have a higher than zero score, or with some opportunity for additional land coverage under the Bailey system if combined with their own properties. This assigned value of $7,000 to $17,000 is not realistic if the adjacent lot owner receives no benefits (privacy is already a certainty) and assumes only liability for this new land.

6. The Johnson affidavit estimates the third highest value for the development commodities as $6,000 to $10,000 for the



development right and associated bonus units. I concur that the original development right is valued between $1,500 and $2,500 however, of the 1,500 bonus units that are available for use in the basin less than 2% (two percent) have been utilized 3 basin wide since their inception 1987. No market exists for these commodities. Additionally, if the property owner were unfortunate enough to have transferred the development right from 6 this parcel between 1987 to 1992 she would not have been subsequently eligible to receive and/or transfer an allocation al a later date.

TRPA maintains that property owners have a "bundle of rights" available from unbuildable properties however, their policies and practices are in direct contrast to this position. During the first five years of the regional plan, if you elected to transfer your development right, you were not only ineligible to receive an allocation you were also not eligible to subsequently and retroactively receive credit for the bonus units if you failed to ask for them. This situation has occurred repeatedly in the past to numerous property owners who were not informed of these rights and were subsequently not given credit for them once the development right was removed. The bundle of rights theory is illusory. The long and short of Mrs. Suitum's situation is that she can do nothing with her now valueless land other than sell it at a "fire sale" price to the government.

7. Land coverage in hydrologic area #1 most recently has sold for $8.00 per square foot. The 183 square feet on the Suitum property would yield a gross value of $1,464.00. However, the application, advertising, consulting, and/or brokerage fees for this transaction would cost at least $464.00 leaving a residual value of $1,000.00.

8. Collectively considering the above referenced values, I believe it is more reasonable to assume the bundle of rights are valued at a low of $2,500.00 to a high of $7,500.00 under the best of circumstances.

9. TRPA submits that its transfer of development rights program is a meaningful and realistic course of relief for the plaintiff. This is not true. Additionally, the land does not retain significant residual value as an adjunct to the transfer remedies. If one could sell this land to an adjacent property owner for

$17,000, I suspect they could sell ice to Eskimos. There is no reason why the plaintiff in this case would have to demonstrate these transfer of development rights remedies are not available prior to adjudicating her claim.

I declare under penalty of perjury that this declaration was executed on the 7th day of January, 1994, at Zephyr Cove, Douglas County, Nevada.

/S/ Paul Kaleta
PAUL KALETA



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(702) 882-1311

Attorneys for Defendant
Tahoe Regional Planning Agency

3/25/94

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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| BERNADINE SUITUM,<br><br>Plaintiff,<br><br>v.<br><br>TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA,<br><br>Defendants. | **CASE NO. CV-N-91-040-ECR**<br><br>**SUPPLEMENTAL AFFIDAVIT OF STEPHEN R. JOHNSON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** |

STATE OF NEVADA ) ss.
CARSON CITY )

I, STEPHEN R. JOHNSON, hereby declare as follows:

1. I am currently President of Johnson-Wright & Associates, a professional Real Estate Appraisal firm.

2. I have been a professional Real Estate Appraiser active in the Northern Nevada area, including Lake Tahoe, for the past 24 years.

3. I am currently a Certified General Real Estate Appraiser in the States of Nevada and California.

4. I have held the MAI designation of the Appraisal Institute since 1976 and am currently certified by the Appraisal Institute.

5. I am professionally qualified to evaluate and appraise the value of and the marketability of coverage transfers, allocations, and bonus units in the Lake Tahoe area.

6. I have testified as an expert Real Estate appraiser in various federal and state courts within the States of Nevada and California in excess of 50 times.

7. I have personal knowledge of the matters hereafter stated, except as to any matters stated in my opinion. As to those matters, I believe my opinion to be true and correct.

PAUL KALETA AS A REAL ESTATE APPRAISER

8. On January 27, 1994, at 2:35 p.m., I confirmed with Ms. Dorothy Zimmerman, Supervisor of Licensing for the Nevada Division of Real Estate, that Mr. Paul Kaleta is not licensed or certified as a Real Estate Appraiser in the State of Nevada.

VALUE TO ADJACENT OWNER

9. It has been this appraiser's observation that a property owner is frequently motivated to buy adjacent property even though the property owners cannot reasonably anticipate future development of the adjacent site. The owner acquires the adjacent site to provide additional open space and greenbelt to his or her property. The open space lots are often acquired to expand the overall yards associated with the individual residences or to control the uses and activities which might occur on an adjacent property.

10. The demand for and value of these adjacent parcels in the Lake Tahoe Basin are demonstrated by the activities of the Nevada Division of State Lands. As a result of the Tahoe Basin Act, the Nevada Division of State Islands has acquired hundreds of environmentally sensitive parcels in the Lake Tahoe Basin over the past five years. After encumbering the parcels with an open space easement, the State of Nevada has sold a number of



the parcels to adjacent property owners. Based upon a review of the open space restrictions which are placed upon each property prior to a re-sale, it is my opinion that the parcels sold by the Nevada Division of State Lands under the Tahoe Basin Act involve more limited development potential and more restricted uses than those permitted under the Tahoe Regional Planning Agency's Rules and Reguladons for a SEZ lot which has an IPES score of zero.

11. Attached as Exhibit "A" to this Affidavit is a true summary of some of the open space lots in the Lake Tahoe Basin portions of Washoe and Douglas Counties, which were first acquired by the State of Nevada and then resold by the state to adjacent owners over the past several years. These sales demonstrate the demand and values which can be achieved for open space lots in the Lake Tahoe Basin.

"FIRE SALE" PRICE TO THE GOVERNMENT

12. On page 5, lines 20 through 22 of his declaration, Mr. Kaleta indicates that Mrs. Suitum can do nothing with her now valueless land other than sell it a "Fire Sale" price to the Government. In fact, under the Tahoe Basin Act, the State of Nevada has already offered Mrs. Suitum $35,000 for her property. Mrs. Suitum rejected the offer. In an interview with Mrs. Sarah Grable of the Nevada Division of State Lands, she indicated that there are still funds available to purchase environmentally sensitive lots. It is therefore this appraiser's opinion that Mrs. Suitum's lot could still reasonably be anticipated to be purchased by the State of Nevada under the Tahoe Basin Act for a price of $35,000.

COMPARABLE SALE DATA

13. On page 3, lines 9 and 10 of his declaration, Mr. Kaleta alludes to a lack of comparable sales data offered by our firm. Accordingly, the following sales data has been compiled. According to realtors and developers in the Incline Village area that we have interviewed, residential building allocations and development rights are bought and sold in Washoe County on a regular basis.

(a) A recent sale of TRPA development rights in the Incline Village area of Washoe County is set forth as follows:

In July of 1993, one residential development right was transferred from Washoe County Assessor's Parcel Number 126-590-07 to a parcel located on Cottonwood Court. The sale price was $6,000. Typical sale prices for development rights in the Incline Village area range from $1,500 to $6,000 each. The low end of the scale is reflective of development rights which are transferred into Incline Village from Placer County.

(b) Some recent sales of TRPA building allocations in the Incline Village area of Washoe County are set forth as follows:

In February of 1993, a building allocation was sold for $20,000. This building allocation was transferred to 484 Country Club Drive. In November of 1993, one building allocation was sold for $9,000. This allocation was transferred to 943 Dorcey Drive. It should be noted that this second allocation was due to expire in one month. Additionally, in July of 1993, one building allocation was sold for $20,000. This allocation was transferred to 573 Valley Drive. Typical sale prices for building allocations in the Incline Village area of Washoe County range from $17,000to $25,000.

(c) Some recent sales of one building allocation plus one development right in the Incline Village area of Washoe County are set forth as follows:

In September of 1993, seven building allocations plus development rights were sold for $18,500 each. These were transferred from Placer County Assessor's Parcel Number 117-100-26 to Washoe County A.P.N. 124 041-79. It should be noted that these transferred rights had no time constraints placed upon them. Also in 1993, one allocation plus development right was transferred for $35,000. These rights were transferred to the lakefront estate owned by the Heller family. Finally, there are 56 allocations plus development rights currently in escrow in Incline Village for $32,000 each.

(d) Some recent sales of vacant open space parcels of land in the Incline Village area of Washoe County with one building allocation, one development right and one bonus unit are set forth as follows:



In 1991, Assessor's Parcel Number 126-530-09 sold for $25,000. This parcel included one building allocation, one development right, and one bonus unit. Each of the rights was subsequently transferred off the property. Also, in June of 1993, Assessor's Parcel Number 126-590-7 sold for $32,000. This lot included one building allocation, one development right and one bonus unit. The building allocation was subsequently transferred from the property and sold for $20,000. The development right was subsequently transferred and sold for a sale price of $6,000.

I declare, under penalty of perjury, under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Carson City, Nevada, March 10, 1994.

/s/ STEPHEN R. JOHNSON
STEPHEN R. JOHNSON, MAI, SREA

SUBSCRIBED and SWORN to Before me
this 24th day of March, 1994.

/s/ Lauren Arends
Notary Public

J. Thomas Susich
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Attorneys for Defendant
Tahoe Regional Planing Agency

3/25/94

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | | |
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| BERNADINE SUITUM,<br><br>Plaintiff,<br><br>v.<br><br>TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA,<br><br>Defendants. | ) CASE NO.<br>) CV-N-91-040-ECR<br>)<br>) AFFIDAVIT OF<br>) SUSAN E. SCHOLLEY<br>) IN SUPPORT OF MOTION<br>) FOR SUMMARY JUDGME<br>)<br>) | |

STATE OF NEVADA ) ss.
CARSON CITY )

I, SUSAN E. SCHOLLEY, hereby declare as follows:

1. I am currently employed by the Tahoe Regional Planning Agency (TRPA) as the Special Projects Attorney.

2. I have been employed by TRPA as legal counsel, in various positions, since March 1983, and as such am familiar with the ordinance and application processes for transfers of land coverage, development rights and allocations.

3. As an attorney for TRPA, I have been responsible for overseeing and implementing the residential allocation system since the adoption of the 1987 Regional Plan. I have worked



closely with the county staff in Washoe County since 1986 on allocation distributions.

PROCEDURES FOR DEVELOPMENT OF RESIDENTIAL LOTS WITHIN THE TAHOE BASIN

4. In order for a property owner to build a single-family residence on his property within the Tahoe Basin he must possess the following elements.

A. An IPES score above the minimum score established for development in that calendar year.

B. A "Residential Development Right".

C. Adequate land coverage.

D. A "Residental Allocation".

5. A person may not develop a residential lot until such time as the IPES score for his lot is equal to or above the IPES line for that year. This is true regardless of whether the person possesses the other three elements. [Mrs. Suitum's IPES score is 0]

6. Each undeveloped residential lot within the basin was assigned one "Residential Development Right" in 1987. A "Residential Development Right" authorizes the building of a single family residence or unit on the lot if the owner possesses the other elements. [Mrs. Suitum possesses one "Residential Development Rights].

7. Land coverage is assigned to each lot in square footage based upon an analysis under TRPA's IPES system. Land coverage refers to the percentage of the lot which may be covered by impervious surface, such as the residence, driveway and decks. [Mrs. Suitum's lot is assigned 183 square feet of coverage].

8. A total of 300 "Residential Allocations" are distributed each year. Initially, all 300 "Residential Allocations" were assigned to the counties for distribution to lot owners. The method of distribution was left to the discretion of each county. Historically, most counties would only issue an allocation to a person with an IPES score above the IPES line, although, from 1987-1989, Washoe County issued allocations to any interested person regardless of their IPES score. However, by 1992, persons

with parcels below the IPES line were not able to obtain a "Residential Allocation" in any of the counties. In order to reinstate the full range of options under the TRPA Regional Plan, TRPA, beginning in 1993, earmarked 10% of the "Residential Allocations" each year for lots with IPES scores below the line. Since the recipients of the earmarked "Residential Allocations" are parcels below the IPES line, use of the earmarked "Residential Allocations" is limited to the sale or transfer of the allocation to a parcel with an IPES score above the line. These earmarked "Residential Allocations" are distributed by TRPA in annual random drawings by county. "Residential Allocations" which are not used within the year of their distribution are returned to the county and TRPA for redistribution the next year. Mrs. Suitum held a "Residential Allocation" in 1989 but did not use or transfer it, and the "Residential Allocation" therefore went back to the county. Mrs. Suitum has not applied for or received a "Residential Allocation" since].

9. All of the elements listed in Paragraph 4. above, except the IPES score, may be sold and transferred to other lots under procedures established by TRPA.

10. A lot which cannot be developed under IPES may also be sold with or without the land coverage, the "Residential Development Right" and, if applicable, the "Residential Allocation", to a party interested in owning the property but not developing it.

RESIDENTIAL ALLOCATIONS

11. Contrary to the statements in Paul Kaleta's affidavit that 1993 was the first year the Suitum property was eligible for a "Residential Allocation" (Paragraphs 4.A and 4.B on page 3), Washoe County permitted the distribution of "Residential Allocations" with IPES scores below the line from 1987 to 1989. As evidence of that fact, the Washoe County list of "Residential Allocation" holders in 1989 includes the Suitum parcel.

12. There is a statement in Mr. Kaleta's affidavit that in 1993 the "probability of receiving an allocation [was] so minuscule as to be inconsequential. " (Paragraph 4.A on page 3). In reality, there were a maximum of 400 parcels below the IPES line eligible to compete for the six earmarked "Residential Allocations" available in 1993 in Washoe County, and the actual



number of parcels which competed was less than thirty. Therefore, if Mrs. Suitum had applied for a "Residential Allocation" in 1993, she would have had approximately one chance in five of receiving a "Residential Allocations.

13. Contrary to Mr. Kaleta's affidavit (Paragraph 4.C on page 3), "Residential Allocation" transfers have occurred in Washoe County from 1987 to the present. Pursuant to its Rules of Procedure (Article V, Section 5.16), TRPA maintains a daily log of its actions on all project applications. A review of the TRPA project log shows that at least 111 "Residential Allocation" transfers have been approved in the Tahoe Region since July 1987. Of those 111 "Residential Allocation" transfers, 23 were in Washoe County. Although it is true that none of the "Residential Allocations" distributed by TRPA in the 1993 drawing for parcels below the IPES line were transferred, several "Residential Allocation" transfers were approved in Washoe County in 1993 using "Residential Allocations" assigned under a litigation settlement agreement with a homeowners' association.

TRANSFER OF RESIDENTIAL DEVELOPMENT RIGHTS

14. Each vacant parcel existing on the effective date of the 1987 plan was assigned a "Residential Development Right". Similar to the "Residential Allocations, a "Residential Development Right" is necessary before a person can build on his or her property. One "Residential Development Right" is required for each residential unit to be constructed. Thus, if a person desired to construct a duplex on his land, he would need two "Residential Development Rights" (as well as two "Residential Allocations"). Contrary to the statement in Mr. Kaleta's affidavit (Paragraph 6 on pages 4-5), a review of the TRPA project log shows that at least 55 transfers of "Residential Development Rights" have been approved from July 1987 to the present. Of those transfers, eight were from Washoe County parcels.

BONUS RESIDENTIAL RIGHTS

15. There are 1600 bonus "Residential Development Rights" available for the 20year life of the 1987 TRPA Regional Plan (not 1500 as alleged by Paul Kaleta in his affidavit). A

bonus "Residential Development Right" has the same function, and is utilized in the same manner, as a "Residential Development Right". The bonus "Residential Development Rights" may be earned in a variety of ways, one of which is the retirement of a SEZ parcel that earns three bonus "Residential Development Rights". Approximately 90 bonus "Residential Development Rights" out of this regional pool have been assigned to qualifying projects and used for the construction residential units. Contrary to the statement in Mr. Kaleta's affidavit (Paragraph 6 on pages 4-5), several projects earned bonus "Residential Development Rights" for the retirement of sensitive parcels and some of those projects received three bonus "Residential Development Rights" because the retired parcels were SEZ parcels (the multiplier referenced in Paragraph 9 of Lyn Barnett's affidavit filed with TRPA's prior memorandum).

SIMULTANEOUS TRANSFERS
OF RESIDENTIAL DEVELOPMENT
RIGHTS, RESIDENTIAL ALLOCATIONS AND
BONUS RESIDENTIAL DEVELOPMENT RIGHTS

16. Contrary to statements in Mr. Kaleta's affidavit (Paragraph 6 at pages 4-5), a "Residential Development Right" and a "Residential Allocation" can be transferred simultaneously and independently of each other. A review of the TRPA project log shows that this has, in fact, occurred at least three times in Washoe County. As to bonus "Residential Development Rights l, if a property owner does not apply for bonus Residential Development Rights", they are not automatically awarded. Mrs. Suitum is not affected by the alleged loss of rights situation referred to in Paul Kaleta's affidavit on page 5 at lines 12 through 22. Mrs. Suitum did, and still does, have the opportunity to transfer both a "Residential Allocation" and a "Residential Development Right", and to apply for an assignment of bonus "Residential Development Rights n earned in conjunction with those transfers.

USE OF SEZ/OPEN-SPACE PARCELS

17. Mr. Kaleta is incorrect in his allegation in Paragraph 5 at page 4 of his affidavit, that an adjoining landowner purchaser cannot use a property with a zero IPES score. While



the TRPA Code prohibits creation of coverage or permanent disturbance of the land, a structure or activity, that allows 75 percent or more of the precipitation to reach the ground and permits the growth of vegetation, could be placed on the property. Examples of such structures are: chaise lounges and patio table, jungle gyms, swing sets, pet enclosures, picnic table, volleyball or badminton sets, and garden trellises. Also, TRPA would permit gardening and landscaping on a zero IPES score parcel subject to standard TRPA limitations on such uses. Also, the adjoining property owner, if he acquired the Suitum parcel, could fence the property to provide privacy and to create a new larger parcel, thereby increasing the resale value of the property.

I declare, under penalty of perjury under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Carson City, Nevada, on March 24, 1994.

/s/ Susan E. Scholley
Susan E. Scholley,
Special Projects Attorney
Tahoe Regional Planning Agency

Subscribed and Sworn to Before me
this 24th day of March, 1994.

/s/ Lauren Arends
Notary Public

**LAUREN ARENDS**
**NOTARY PUBLIC - NEVADA**
**CARSON CITY,**
**My Appt. Expires Jan 4, 1997**

(Certificate of Service by Mail omitted in printing.)

3/30/94

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM,
Plaintiff,

CV-N-91-040-ECR

v.

ORDER

TAHOE REGIONAL
PLANNING AGENCY; and
STATE of NEVADA,
Defendants.

/

This case involves a takings claim by plaintiff Suitum, the owner of a single-family residential lot in Incline Village, Washoe County, Nevada, classified as stream environment zone (SEZ), to recover damages because she is not allowed to build a residence on the property. Plaintiff has appealed the score of her lot under the Individual Parcel Evaluation System (IPES) but has not attempted to transfer development rights from the parcel at issue to another parcel under the transfer development plan created by Tahoe Regional Planning Agency (TRPA).

Defendants filed a motion for summary judgment (document #66) arguing, in part, that this Court has no jurisdiction over this action because plaintiff's claim is no ripe. Specifically at issue is the fact that plaintiff has failed to apply to TRPA to transfer development rights from her property. It is argued therefore, that plaintiff has not pursued the key avenue of relief for one owning SEZ land in the Lake Tahoe Basin.

This Court ordered that the parties submit supplemental briefs regarding the procedures, prerequisites, and value of the transfer of development rights as applicable in this case so that the Court could determine if the only avenue not yet pursued was a application for a meaningful use of the property (Order dated November 23, 1993 document #71). The parties submitted briefs



and additional affidavits on the issue.[2] The briefing on this issue was completed on February 28, 1994 and the Court addresses the issue in this expedited order.

Ripeness of a claim governs the power of a federal court to act in a takings case. This Court does not have subject matter jurisdiction unless the claim is ripe. *Macdonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456-57 (9th Cir. 1987) *modified*, 830 F.2d 968 (9th Cir. 1987) *cert. denied*, 484 U.S. 1043 (1988).

An essential prerequisite to a regulatory takings claim is the final and authoritative determination of the type and

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[2] The affidavit of Paul Kaleta is inadequate under FRCP 56(e) and is disregarded by the Court. There is no showing that Mr. Kaleta is an expert. In order for opinions and conclusions to be transformed into evidence admissible at trial such opinions and conclusions must be offered by a qualified expert. A witness may be qualified as an expert by knowledge skill, experience, training or education...: FRE 702. While Mr. Kaleta's affidavit is full of opinions and conclusions as to the value of Plaintiff's development rights, he is not neither licensed nor certified as a real estate appraiser in the State of Nevada nor has he recited any knowledge, skill, experience, training or education which would qualify him to testify as an expert as to the valuation of development rights with which this Court is concerned.

intensity of use legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. *Macdonald, Sommer & Frates v. Yolo County*, at 348.

As things now stand, there is no final decision as to how plaintiff will be allowed to use her property. *See Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-191 (1985). The Court is convinced that the transfer rights are significant to the takings calculus. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978); *American Savings & Loan v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (recognizing that transferable development rights mitigate financial burdens of zoning regulations and must be considered when considering the economic impact of a regulation). The briefing and affidavits presented to the Court on the issue illustrates that the transfer of development rights program created by TRPA is specifically designed to give relief to owners of SEZ properties. The finality, in terms of allowed use of the property, may only be determined after plaintiff applies to transfer her development rights. The specific examples of sales of rights in the past demonstrates there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to. In fact, an application for transfer is the only "meaningful application" that can be made once property is determined to be SEZ. *See Kinzli* 818 F.2d at 1454-1455. In addition, there may be significant residual value as an adjunct to the transfer remedies.

The determination that the application for transfer rights is necessary before the takings claim in the case at hand can be considered ripe also comports with the other cases holding that pursuit of transfer rights is among the list of things that must be pursued in order for a takings claim to be ripe. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 &n.6 (D.Nev. 1986) *vacated in part on other grounds*, 911 F.2d 1331 (9th Cir. 1990), *cert. denied* 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied*, 111 S.Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992).



Absent an application to transfer development, and a final decision on such application, we cannot know whether plaintiff's land indeed is unusable. Without a decision as to the transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with plaintiff's reasonable investment-backed expectation, cannot be assessed. *Id.* Suitum's takings, substantive due process and equal protection claims are not ripe for consideration by this court. Plaintiff may not take her claims to trial without applying to transfer her development rights. TRPA's endeavor to do equity to SEZ holders would be rendered utterly meaningless. Moreover, until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations.

Plaintiff's claims are not ripe and this Court does not have jurisdiction over this action.

IT IS THEREFORE HEREBY ORDERED that TRPA's Motion for Summary Judgment (document #66) is GRANTED on all claims. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that Plaintiff's Cross Motion for Summary Judgment (document #68) is MOOT.

IT IS FURTHER ORDERED that Defendant's Motion for Protective Order Striking Supplement to Answers to Interrogatories and for Expenses (document #78) is DENIED. The affidavit of Paul Kaleta and the Court's reliance thereon is addressed in this order at N.1.

DATED: March 30th 1994.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE

4/01/94

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| BERNADINE SUITUM, | ) | |
| | ) | No.94-15768 |
| Plaintiff-Appellant, | ) | |
| v. | ) | D.C. No. |
| | ) | CV-91-040-ECR |
| TAHOE REGIONAL | ) | |
| PLANNING AGENCY, | ) | **OPINION** |
| | ) | |
| Defendant-Appellee. | ) | |

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted
November 13, 1995--
San Francisco, California

Filed: April 1, 1996.

Before: Mary M. Schroeder and
Arthur L. Alarcon, Circuit Judges,
and Owen M. Panner,* District Court Judge

Opinion by Judge Panner

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.



## SUMMARY

**Individual Rights/Constitutional Rights/Real Estate**

The court of appeals affirm a district court judgment. The court held that a property owner's claim that an agency committed an unconstitutional taking when it refused to permit her to build a home on her residential lot was unripe, where the owner had not applied for a transfer of her development rights through an available program.

A 1987 plan (Plan), which was drafted pursuant to the 1980 Tahoe Regional Planning Compact, included an Individual Parcel Evaluation System (IPES), under which appellee the Tahoe Regional Agency (TRPA) assigned a numerical score to a residential lot depending on its relative environmental suitability for development. The TRPA annually established a numerical IPES level enabling owners of parcels with IPES scores above a certain level to seek building permits. The Plan also created Stream Environment Zones (SEZs) and allowed no new land coverage or other permanent land disturbance with SEZs, except for certain limited public uses. The Plan established criteria that a property owner had to meet before building a single-family residence.

The Transfer of Development Rights (TDR) program allowed for transfers of land coverage, residential development rights, and residential allocations. For property within a SEZ, the property owner could transfer one percent of the total property area. Subject to county approval and the receiving parcel's use and density eligibility, residential development rights could be transferred anywhere in the Lake Tahoe Basin. Property owners were allowed to transfer a residential allocation from a parcel with a low IPES score to any parcel that had an IPES score above the annual IPES level.

Appellant Bernadine Suitum owned property located in a SEZ in the Basin. Suitum had one residential development right and 183 square feet of land coverage available to transfer. She did not apply for another residential allocation or to transfer her

residential development right or available land coverage under the TDR program. Suitum brought a civil rights action against the TRPA, alleging that it committed an unconstitutional taking and violated her substantive due process and equal protection rights when it refused to permit her to build a home on her residential lot. The district court granted summary judgment to the TRPA, concluding that Suitum's claims were unripe. Suitum appealed.

**[1]** The "final decision requirement" required Suitum to show that before filing suit, she sought a final decision from the TRPA in regard to the application of the regulation to the property. **[2]** Suitum had to apply for the transfer of her development rights through the TDR program before her claim would be ripe. **[3]** Without an application for the transfer of development rights, the TRPA was foreclosed from determining the extent of the use of her property. **[4]** Without pursuit of the transfer of development rights, it could not be known whether the regulations went too far; no one knew how far the regulations went. Without attempting to transfer the rights she possessed, Suitum could not know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations. **[5]** Within the unique TRPA regulatory scheme, transfer of development rights was a "use" of SEZ property.

**[6]** The district court did not abuse its discretion in excluding from ripeness analysis an affidavit from a former TRPA staff member familiar with TRPA ordinances and application procedures for transfer of development commodities. **[7]** The specific issue on which expert testimony was relevant was the value of Suitum's transfer of development rights. The former staff member was not an appraiser. **[8]** Given that Suitum's development rights possessed significant value, she failed to meet her burden of showing that participation in the TDR program was futile.

**[9]** Compliance with the final decision process is required to establish a ripe claim, even where it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations.

## COUNSEL

William Patterson Cashill, Reno, Nevada, for the plaintiff-appellant.



J. Thomas Susich, Vicki E. Hartigan, Crowell, Susich, Owen & Tackes, Carson City, Nevada, for the defendant-appellee.

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## OPINION

PANNER, District Judge:

In this 42 U.S.C. S 1983 action, Bernadine Suitum alleges that the Tahoe Regional Planning Agency (TRPA) committed an unconstitutional taking and violated her rights to substantive due process and equal protection when it refused to permit her to build a home on her residential lot in the Lake Tahoe Basin. The district court concluded that Suitum's claims were unripe and granted summary judgment to TRPA. We affirm.

## BACKGROUND

I. TRPA

TRPA was created in 1969 by the Tahoe Regional Planning Compact. Pub. L. 91-148, 83 Stat. 360; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1969 Compact); *amended*, Pub. L. 96-51, 94 Stat. 3233; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1980 Compact). We have previously detailed TRPA's background and it need not be repeated here. *See, e.g., People of Calif. v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1310-1312 (9th Cir.), *amended*, 775 F.2d 998 (9th Cir. 1985).

II. The 1987 Plan

The 1987 Plan, drafted pursuant to the 1980 Compact, governs development of Suitum's property and includes the Individual Parcel Evaluation System (IPES) under which TRPA assigns a numerical score to a residential lot depending on its relative environmental suitability for development. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1320 (D. Nev. 1992)(listing relevant environmental criteria). TRPA annually establishes a numerical IPES level enabling owners of parcels with IPES scores above the stated level to seek building permits. Owners of parcels with IPES scores below that level may proceed with development only if the level is lowered. *Id.*

The 1987 Plan also creates Stream Environment Zones (SEZs) which generally convey surface water from upland areas

into Lake Tahoe and its tributaries. The 1987 Plan allows no new land coverage or other permanent land disturbance within SEZs, except for certain limited public uses.

Finally, the 1987 Plan establishes four criteria that the property owner must meet before building a single-family residence: (1) an IPES score above the numerical level established for development in that calendar year; (2) a residential development right; (3) adequate land coverage; and (4) a residential allocation.

III. Transfer of Development Rights

The Transfer of Development Rights (TDR) program is "an elaborate system of transfers of development rights[,]" *id.*, which allows for transfers of land coverage, residential development rights, and residential allocations. A property owner may transfer land coverage to a receiving parcel within the same hydrologic zone allowing for construction of a larger project on the receiving parcel. For property within a SEZ, the property owner is allowed to transfer one percent of the total property area. For example, Suitum's property is approximately 18,300 square feet. Because it is located in a SEZ, she is allotted 183 square feet of land coverage to transfer to another parcel.

Subject to county approval and the use and density eligibility of the receiving parcel, residential development rights may be transferred anywhere in the Lake Tahoe Basin. Property owners may transfer a residential allocation from a parcel with a low IPES score to any parcel with an IPES score above the annual IPES level.

IV. Development of Suitum's Property Under the 1987 Plan

Suitum purchased the property in 1972 and first attempted development of the lot in 1989 when she obtained a residential allocation from Washoe County for the construction of a house. After a field verification, TRPA initially determined that the property was entirely located in a SEZ and then assigned it a zero IPES score. Suitum appealed. TRPA upheld the IPES score on the basis that the lot was located in a SEZ.

Suitum has one residential development right and 183 square feet of land coverage available to transfer. Although she obtained



a residential allocation in 1989, she did not use it that year and it reverted back to the county. Suitum has not applied for another residential allocation. Suitum has not applied to transfer her residential development right or available land coverage under the TDR program.

## DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo. *Han v. Mobil Oil Corp.*, No. 94-55373, slip op. 15379, 15382, 1995 WL 728210 at *1 (9th Cir. Dec. 11, 1995). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Id.* at 15383. We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

II. General Taking Claim Standards

A regulatory taking in violation of the Fifth Amendment, such as that alleged by Suitum, occurs if the regulation "denies an owner economically viable use of his land." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 (9th Cir. 1994). "[T]he term 'economically viable use' has yet to be defined with much precision." *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993). However, "the existence of permissible uses generally determines whether a development restriction denies a property holder the economically viable use of its property." *Id.* The regulation's economic impact and the extent to which it interferes with investment-backed expectations are relevant to the inquiry. *Penn Cent. Transport Co. v. City of New York*, 438 U.S. 104, 124 (1978). In sum, "determining whether a regulatory action effects a taking requires complex factual assessments of the purposes and economic effects of government actions[.]" *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 924 (1994).

II. Ripeness Requirements for As-Applied Claims

A. Ripeness

[1] An "as applied" challenge is "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Carson Harbor*,

37 F.3d at 474. We have previously noted that there are "two independent hurdles to the filing of a [regulatory] taking claim in federal court against a state or local government." *Id.* (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). Only the first, known as the "final decision requirement," is at issue in this case and it requires Suitum to show that before filing suit, she sought a "final decision from [TRPA] regarding the application of the regulation to the property at issue." *Carson Harbor*, 37 F.3d at 474.[1]

We recently explained that finality "helps the court evaluate whether regulation of the subject property is excessive by identifying the extent of the regulation." *Dodd v. Hood River County*, 59 F.3d 852, 858 (9th Cir. 1995). The court cannot "determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)).

[2] We have not previously discussed the effect of a transfer of development rights on a regulatory taking claim. However, Judge Fletcher has made clear, in dicta, that she would require pursuit of transfer of development rights before a regulatory taking claim against TRPA could be considered ripe. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1344 n.3 (9th Cir. 1990)(Fletcher, J. concurring), *cert. denied*, 499 U.S. 943 (1991). As explained below, we agree with Judge Fletcher, and the district court, and conclude that Suitum must apply for the transfer of her development rights through the TDR program before her claim is ripe.

[3] Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use

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[1] These ripeness requirements are equally applicable to the due process and equal protection claims. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1231-32 (9th Cir.) (substantive due process), *cert. denied*, 115 S. Ct. 193 (1994); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56 (9th Cir.) (equal protection and substantive due process), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).



of Suitum's property. *Dodd*, 59 F.3d at 858. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form[] of relief ... which might abate the alleged taking." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir.), *cert. denied*, 502 U.S. 498 (1990).

[4] Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. *MacDonald*, 477 U.S. at 348. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" *Kinzli*, 818 F.2d at 1453, and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis. *Youpee v. Babbitt*, 67 F.3d 194, 197 (9th Cir. 1995).

[5] Although in the more typical scenario a plaintiff may face a municipal planning board which reviews modified development plans or requests for variances, here, the TDR program effects the same purpose: facilitating alternative uses of the property. We recognize that TRPA's regulatory scheme is unique and conclude that within that scheme, transfer of development rights is a "use" of SEZ property. The key inquiry is whether the property retains "any reasonable beneficial use[.]" *MacDonald*, 477 U.S. at 349. That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

B. Futility Exception

We recognize a "limited" futility exception to the ripeness doctrine. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990). Generally, the final decision requirement is excused if the plaintiff shows that it would be an "idle and futile act" or that the application procedures are unfair. *Kinzli*, 818 F.2d at 1454, 1455; *Del Monte Dunes*, 920 F.2d at 1496 (plaintiff's burden).

Suitum argues that her claims are ripe because the TDR program is a "ruse, a sham." She contends that the TDR program has produced no sales and that her property has no marketable

development rights. In support of her argument, she relies on the affidavit of her expert, Paul Kaleta, a former TRPA staff member who is now a private consultant and who is familiar with TRPA ordinances and application procedures for transfer of development commodities.

In support of its contention that pursuit of transfer of development rights under the TDR program is meaningful, TRPA relies on the affidavit of Certified Appraiser Stephen R. Johnson who has twenty-four years of appraising experience in the Lake Tahoe area. He attests that Suitum's development rights have value.

1. Exclusion of Kaleta's Affidavit

[6] The district court concluded that there is significant value in the transfer of residential development rights and transfer of residential allocations. In reaching this conclusion, the district court disregarded Kaleta's affidavit and relied only on the valuation evidence submitted by TRPA. We conclude that the district court did not abuse its discretion in excluding Kaleta's affidavit from the court's ripeness analysis.

We review "a district court's decision to admit or exclude expert testimony for an abuse of discretion." *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995). "Generally, a district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts." *Id.*

[7] Suitum contends that Kaleta's experience as a TRPA regulator qualifies him to testify as to the value of her development rights. To offer an expert opinion, Kaleta must possess the required knowledge, skill, experience, training, or education. Fed. R. Evid. 702. The specific issue on which expert testimony is relevant is the value of Suitum's transfer of development rights. It was not a clear error of judgment for the district court to conclude that a licensed appraiser or someone with demonstrated experience in *valuation* was the proper expert on this issue. Kaleta is not an appraiser either by experience, education, or other training. His experience in facilitating property owners in TDR program transfers is not equivalent to experience in assigning a market value to TRPA development rights. The district court's exclusion of Kaleta's affidavit was not an abuse of discretion.



[8] TRPA's evidence shows that without an allocation right, Suitum's development rights are valued from $10,000 to $21,500 or more. With an allocation right, the value increases by approximately $30,000. Given that Suitum's development rights possess some significant value, Suitum fails to meet her burden of showing that participation in the TDR program is futile. Thus, her application to the TDR program is required to present ripe taking, equal protection, and substantive due process claims to the court.

Finally, we reject Suitum's suggestion made at oral argument that because the TDR program is not designed to give her just compensation, she need not participate in it to demonstrate ripeness. In the regulatory taking analysis, a taking must be established before the question of just compensation arises. The object of the final decision requirement is to determine whether a taking has occurred at all, independent of any compensation issue, by examining the extent of the regulations' economic impact and interference.

[9] Pursuit of a final decision in general, and application to the TDR program in particular, may mitigate the regulations' economic effect and result in a diminution in value rather than a more severe economic impact. The imposition of regulatory ordinances that merely diminish the value of property does not constitute a taking. *See, e.g., William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (diminution of property value from $2 million to $100,000 not a taking), *cert. denied*, 445 U.S. 928 (1980). Therefore, compliance with the final decision process is required to establish a ripe claim, even when it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations. Because Suitum failed to apply for transfers of development rights through the TDR program and fails to demonstrate that such an application would be futile, her claims are unripe for adjudication.

III. TRPA's Request for Attorney's Fees on Appeal

Pursuant to 42 U.S.C. § 1988, TRPA asks for attorneys' fees for defending this appeal. We may award attorneys' fees under section 1988 to the prevailing party for fees on appeal. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir.

1986), *amended* 808 F.2d 1373 (9th Cir. 1987). We reject TRPA's request for fees. Suitum's claim was not frivolous or groundless and fees are inappropriate under the circumstances. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (court may award section 1988 fees when the claim is "frivolous, unreasonable, or groundless").

AFFIRMED.



**Filed 5/13/96**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| BERNADINE SUITUM, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | No. 94-15768 |
| v. | ) | D.C. No.CV-91-040-ECR |
| | ) | |
| TAHOE REGIONAL | ) | |
| PLANNING AGENCY, | ) | ORDER |
| | ) | |
| Defendant-Appellee. | ) | |

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

No. 96-243

In the

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S BRIEF ON THE MERITS

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## QUESTION PRESENTED FOR REVIEW

Must a property owner sell transferable development rights (TDRs) and apply for agency approval of the sale in order to ripen a takings claim under the *Williamson County* final decision requirement when:

a. the regulatory agency has already conclusively determined that no viable use of her parcel of land will be permitted;

b. a TDR transfer will not allow her to make any use of her parcel of land; and

c. the maximum extent of development credits available for transfer via the TDR program are already definite and certain and can be valued by normal appraisal methods?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed April 1, 1996, is reported at 80 F.3d 359 and is reprinted in the Joint Appendix (App.) at 154.

The Ninth Circuit's Order denying petitioner's Petition for Rehearing, filed May 13, 1996, was not reported and is reprinted at App. 165.

The Order of the United States District Court, District of Nevada, Judge Edward C. Reed presiding, dated March 30, 1994, was not reported and is reprinted at App. 150.

## STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the the United States Court of Appeals for the Ninth Circuit, filed April 1, 1996. This Court granted the Petition for Certiorari on October 15, 1996. *Suitum v. Tahoe Regional Planning Agency*, No. 96-243 (Petition for Certiorari granted) (Oct. 15, 1996). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

Pertinent provisions of the Tahoe Regional Planning Agency Code of Ordinances, adopted May 27, 1987, effective July 26, 1987, are set forth in the Joint Appendix at App. 45-85; App. 100-17.

## STATEMENT OF THE CASE

Petitioner Bernadine Suitum has been deprived of all economically viable use of her retirement homesite near Lake Tahoe. Compounding this injury, Mrs. Suitum has also been denied access to the federal courts to seek just compensation for the regulatory taking of her property.

## A. TRPA Has Denied Mrs. Suitum Any Beneficial Use of Her Retirement Homesite

In 1972, Mrs. Suitum and her late husband purchased a residential lot at 159 Mayhew Circle in the Mill Creek Estates subdivision of Incline Village, Nevada, on which they planned to build their retirement home. First Amended Complaint, App. 14. After a series of personal and financial setbacks, including the illness and death of her husband, Mrs. Suitum was finally able to proceed with her plans in 1989. *Id.* By that time Mrs. Suitum's 18,300 square foot parcel was one of the last remaining undeveloped lots in the subdivision. *Id.* Her property is surrounded on three sides by residential homes similar to the one Mrs. Suitum hoped to build. The fourth side of the property abuts a paved street with a curb and gutter. All utilities necessary for a single-family residence have been extended to her property line. *Id.* Prior to 1989, Mrs. Suitum's subdivision lot was classified as suitable for residential construction.[1]

Respondent Tahoe Regional Planning Agency (TRPA) regulates property in the Lake Tahoe region.[2] Under TRPA's current Regional Plan for the Lake Tahoe Basin (the 1987 Plan) the agency determines the amount and density of construction it will permit on all unbuilt residential lots in the region. Affidavit of Susan E. Scholley in Support of Motion for Summary Judgment (Scholley Aff.), App. 145-46.

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[1] Prior to the 1989 implementation of TRPA's Individual Parcel Evaluation System, the agency established thresholds for impervious land cover using a seven-point scale, ranging from land most suitable for development (Class 7) to land that should remain in its natural condition (Class 1). *See People of the State of California v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1315 (9th Cir. 1985). Mrs. Suitum's property was assigned a rating of six on this seven-point system. First Amended Complaint, App. 14.

[2] TRPA was formed in 1969 by an interstate compact between the States of California and Nevada, ratified by Congress in the 1969 Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969), and amended in 1980, Pub. L. No. 96-51, 94 Stat. 3233; California Government Code § 66801; Nevada Rev. Stat. § 277.200.



In 1989, Mrs. Suitum submitted to TRPA plans to build a home on her subdivision lot. TRPA responded by classifying Mrs. Suitum's property as lying within a "Stream Environment Zone" (SEZ). First Amended Complaint, App. 14-15. According to TRPA's 1987 Plan these zones, which affect a small percentage of property in the Lake Tahoe area, "provide surface water conveyance from upland areas into Lake Tahoe and its tributaries." 1987 Plan, App. 25. The significance of TRPA's classifying Mrs. Suitum's lot as part of a Stream Environment Zone is that "no new land coverage or other permanent land disturbance shall be permitted" on Mrs. Suitum's land. *Id.*, App. 26.[3]

This decision was confirmed by TRPA's assigning Mrs. Suitum's property a rating of zero under the agency's Individual Parcel Evaluation System (IPES). The IPES system, implemented in 1989, assigns numerical scores to undeveloped properties reflecting TRPA's opinion of their suitability for development. *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996) (*Suitum*), reprinted at App. 154. TRPA annually establishes an arbitrary IPES cutoff level; only owners of parcels with scores above the cutoff may apply for building permits. Scholley Aff., App. 145. The cutoff score was initially set at 725, and this level prevailed until 1994 in the county where Mrs. Suitum's lot is located. Affidavit of Lyn Barnett in Support of Motion for Summary Judgment (Barnett Aff.), App. 98. Under the TRPA Code and the 1987 Plan, all construction is forbidden on properties with a zero IPES rating, such as Mrs. Suitum's. First Amended Complaint, App. 15. According to TRPA, the fact that Mrs. Suitum's lot "is surrounded by developed parcels and is serviced by a paved street and utilities is not part of the IPES scoring elements." Opposition to Defendant's Motion for Summary Judgment, Court Record (CR) 68, Exhibit 2 at 14.

Mrs. Suitum appealed the determination that she could not build on her residential lot to TRPA's governing board. First Amended Complaint, App. 15. On November 27, 1990, after a public hearing, the board denied Mrs. Suitum's appeal. *Id.* No further procedures for administrative review are available, and

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[3] *See also* TRPA Code of Ordinances (TRPA Code) § 20.4.B, App. 62.

TRPA's regulations include no provisions for seeking variances, waivers, or other exceptions from final determinations of the board. Order of District Court dated November 23, 1993 (1993 Order), App. 88.

**B. The Federal District Court Declined to Reach Mrs. Suitum's Regulatory Takings Claim Because She Had Not Attempted to Sell TRPA's Administrative Credits to a Third Party**

On January 28, 1991, Mrs. Suitum filed suit in the United States District Court for the District of Nevada, alleging that TRPA's application of its regulations and ordinances to her property *inter alia* violated her civil rights under the Fifth and Fourteenth Amendments to the United States Constitution and took her property without payment of just compensation.[4]

In an order dated November 23, 1993, the trial judge acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred *to* the property at issue." 1993 Order, App. 88. However, the court requested additional briefing on TRPA's "transfer of development rights" (TDR) process. *Id.*, App. 89.

**1. TRPA's Marketable Credits**

As part of its overall restrictions on the use of private residential land, TRPA has created a menagerie of administrative credits that property owners are required to possess in order to build a home on their property. These credits are designated "Residential Allocations," "Residential Development Rights," and "Land Coverage." Scholley Aff., App. 145. Although owners of property situated in a Stream Environment Zone are forbidden from making any use of their land, TRPA has created procedures by which the agency's administrative credits can be distributed to the owners of such parcels who *in theory* may then sell them to the owners of other,

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[4] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 42 U.S.C. § 1983. A First Amended Complaint was filed on September 16, 1992, App. 13.



development-eligible lots.[5] Barnett Aff., App. 96-98. Thus, although Mrs. Suitum has been categorically forbidden from building any structure on her property or making any other use of this small parcel that would involve covering or permanently disturbing the land, she may attempt to market TRPA's administrative credits to other owners who may thereby be allowed to increase the development of their own land. This process is generically--albeit misleadingly--described as "transfer of development."[6]

TRPA's credits are administrative contrivances created wholly at the agency's discretion as part of its comprehensive regime of land use regulation. Each of the three types of credits functions to impose a separate development restriction and is created and obtained by landowners in a different manner.

TRPA distributes 300 "Residential Allocations" annually as a means of limiting the number of residences built in the region each year. Barnett Aff., App. 98. A property owner needs one Allocation for every unit to be built; Allocations which are not used within one year are forfeited. Scholley Aff., App. 145-46. Residential Allocations must be obtained through the county in which one's land is situated. Washoe County, Nevada, the jurisdiction in which the Mill Creek Estates subdivision is located, reserves 6 of its 60 annual Allocations for owners of parcels that TRPA deems ineligible for development. To obtain one of these scarce credits, Mrs. Suitum must enter and win a random drawing--in essence, a lottery. Barnett Aff., App. 99.

"Residential Development Rights" (RDRs) function to limit the total amount of residential development that will ultimately be allowed in the Lake Tahoe region. TRPA automatically distributes one RDR to the owner of each vacant residential parcel under its

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[5] The record contains no evidence that any owner of residential property in a Stream Environment Zone has ever actually consummated a sale of these credits to another residential property owner. No sales were recorded for any of the Residential Allocations distributed to the owners of lots rated below the IPES cutoff in 1993. Scholley Aff., App.147.

[6] *See* 1987 Plan, App. 38; TRPA Code Chap. 34, App. 68.

jurisdiction. Barnett Aff., App. 97. Each RDR authorizes the property owner (assuming the owner also possesses the other required credits) to build one residential unit; multiunit development requires the aggregation of RDRs from the owners of other properties. *Id.*, App. 97-98. There is no one-to-one correspondence between the number of undeveloped parcels in the region and the number of RDRs TRPA may see fit to create. This is illustrated by the fact that owners of parcels situated in a Stream Environment Zone, like Mrs. Suitum, are awarded three arbitrarily created "bonus" RDRs. TRPA's Memorandum Concerning Its Transfer of Development Program, App. 92.

The "Land Coverage" credit serves to limit surface coverage on individual lots and to cap the total amount of land coverage that will be allowed in the region. The credit generally corresponds to that part of the area of a given lot that TRPA will allow to be covered by an impervious surface.[7] For land situated in a Stream Environment Zone, the credit represents 1% of the area of the parcel.[8]

Each of TRPA's three types of development credits can thus be seen as a separate development *restriction* imposed on each owner of undeveloped land in the region.

**2. The Transfer Process**

Under the TRPA Code, the owner of a parcel situated in a Stream Environment Zone may attempt to market the following credits: a Land Coverage credit equal to 1% of the area of the lot;[9] a Residential Allocation (if one has been obtained by winning the

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[7] TRPA assigns "base coverage" to individuals lots according to their IPES rankings. *See* 1987 Plan, App. 40; TRPA Code § 20.3.A, App. 45.

[8] TRPA Code § 20.3.A, App. 45.

[9] TRPA Code § 20.3.C(2)(c), App. 52.



annual lottery and if a sale can be consummated before the Allocation expires);[10] and four RDRs, including three "bonus" credits.[11]

Although TRPA's approval is not required to establish the credits Mrs. Suitum is entitled to market, or for her to seek to sell the credits, the agency requires its review and approval of the *purchaser* of the credits before any sale can be finalized. *See* Transfer Application, reprinted at App.118.[12] This approval process confirms the eligibility of the buyer to use the purchased credits.[13] Moreover, before any sale will be approved, TRPA requires that the seller execute and record deed restrictions or covenants "permanently removing" the owner's development rights from the lot situated in a Stream Environment Zone.[14] The seller is also required to execute an instrument providing for the perpetual maintenance of her land in its natural state.[15]

Having received briefing on this process, on March 30, 1994, the District Court granted TRPA's motion for summary judgment on the ground that Mrs. Suitum's case was not ripe for adjudication in that she had not attempted to find a buyer for the agency's marketable credits. Order of District Court dated March 30, 1994 (1994 Order), reprinted at App. 150. Citing this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985), the trial judge ruled that,

> [a]bsent an application to transfer development, and a final decision on such application, we cannot know

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[10] TRPA Code § 34.3.A, App. 70.

[11] TRPA Code § 34.2.A, App. 69; § 35.2.D(4)(b), App. 112.

[12] This form was Exhibit "ff" to the Barnett Aff, App. 96.

[13] TRPA Code § 20.3.C, App. 52; § 34.2.C-D, App. 69; § 34.3, App. 70-71.

[14] TRPA Code § 20.3.C(7)(a), App.57; § 34.2.B, App. 69; § 34.5.A, B, H, App. 73, 75.

[15] TRPA Code § 20.3.C(7)(a)(ii), (iii), App. 57.

> whether [Mrs. Suitum's] land indeed is unusable. Without a decision as to transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with [Suitum's] reasonable investment-backed expectation, cannot be assessed.

*Id.*, App. 153.

### C. The Ninth Circuit Ruled Mrs. Suitum's Takings Claim Is Not Ripe Because TRPA Had Not Reached a Final Decision as to the Permitted "Uses" of Mrs. Suitum's Property

In a published decision, the Ninth Circuit affirmed the judgment of the trial court. *Suitum*, App. 155. The appellate panel analogized participation in the TDR process to the submission of a modified development plan or variance request, since "the TDR program effects the same purpose: facilitating alternative uses of the property." *Suitum*, App. 161. The court specifically held that "transfer of development rights is a 'use' of SEZ property." *Id.*

The Ninth Circuit held that Mrs. Suitum's case is not ripe for review because

> [w]ithout an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property.
>
> ....
>
> Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. ... Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development ... and thus cannot know the regulations' full economic impact."

*Suitum*, App. 160-61 (citations and brackets omitted).

The Ninth Circuit acknowledged that there is no uncertainty concerning what credits are available for Mrs. Suitum to attempt to market, *Suitum*, App. 158-59, and it acknowledged that both parties



attempted to introduce evidence of the value of those credits. *Id.*, App. 161-63. Nonetheless, the court below held that Mrs. Suitum's "pursuit" of the sale of TRPA's credits--including an application for TRPA's approval of the purchase of the credits by some third party--was required before the court could determine the extent to which TRPA had deprived Mrs. Suitum of the use of her land. *Id.*, App. 161, 163.

Mrs. Suitum timely filed a petition for rehearing, which was denied on May 13, 1996. Order Denying Rehearing, dated May 13, 1996, reprinted at App. 165. This Court granted certiorari on October 15, 1996.

## SUMMARY OF ARGUMENT

The court below found Mrs. Suitum's takings claim to be unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 190-94, because the opportunity to market TRPA's administrative credits was deemed a "use" of Mrs. Suitum's property. *Suitum*, App. 161. This holding conflicts with the opinions of this Court in *Williamson County* and subsequent ripeness cases, in which the only relevant "use" of property has been the owner's ability to build on her land. *E.g., Williamson County*, 473 U.S. at 190; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). This traditional equation of "use" with "development" is especially appropriate in the present case, since Mrs. Suitum's reasonable investment-backed expectation from the time she bought her land was that she would be allowed to build a home on her residential subdivision lot. App. 2.

TRPA's "transfer of development" program does not in fact provide for the transfer of Mrs. Suitum's right to develop her land, which has been totally extinguished by the application of TRPA's regulations. App. 88. Instead, the program amounts to the sale of variances to third parties for cash paid to Mrs. Suitum, whereby the *recipients* (if any can be found) would pay to be allowed to exceed TRPA's restrictions on the development of their own land. To characterize this trilateral variance-for-cash scheme a "use" of Mrs. Suitum's land would deprive that word of all its ordinary meaning.

In order to complete a sale of TRPA's credits under the TDR program in question, the seller must *permanently retire* her own

property from development, executing a deed restriction or comparable covenant forfeiting her right to build in perpetuity. App. 99. This Court has never held that an owner is required to alienate her interest in real property to ripen a claim for a regulatory taking based on the denial of all beneficial use. In addition to the manifest injustice of such a requirement, compliance would deprive Mrs. Suitum of an invalidation remedy under her due process cause of action and invite the argument that participating in the TDR program had rendered her takings claim moot. It would also deprive the public agency of the flexibility to rescind the application of its regulations, thereby limiting its liability to damages for a *temporary* taking.

Although ostensibly limited to a ruling on ripeness, the decision below calls into question the viability of this Court's categorical takings rule in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). If participating in TRPA's TDR program can be deemed a "use" of an owner's property, *Lucas*' categorical rule would be drained of any significance; a landowner would never be deprived of all "use" of her land so long as administrative credits could be contrived that might conceivably be of value to someone, somewhere. Arbitrarily created, marketable coupons cannot be regarded a "use" of property for purposes of either *Williamson County* ripeness or *Lucas'* substantive takings rule.

## ARGUMENT

The issue in this case is whether this Court's ripeness doctrine requires a property owner to permanently relinquish the development rights to her land, sell marketable administrative credits to a third party, and apply for agency approval of the sale before her regulatory takings claim will be deemed ripe for adjudication.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has found two categories of regulatory actions to comprise compensable takings regardless of the nature of the public interest they may advance. The first includes regulations that authorize a permanent physical invasion of private property; the second encompasses regulations that "den[y] all economically beneficial or productive use of land." *Lucas v. South Carolina*



*Coastal Council*, 505 U.S. at 1015. The *Lucas* Court described the latter categorical rule as applying typically to regulations "requiring land to be left in its natural state." *Id.* at 1018.

The clarity of this Court's categorical takings doctrine stands in unfortunate contrast to the confusion and conflict prevailing among the lower federal courts on the question of when a regulatory takings claim is ripe for adjudication. The "final decision" or "finality" ripeness requirement set forth by this Court for an as-applied regulatory takings claim is straightforward: a property owner alleging a taking based on the denial of a development application must obtain "a final, definitive position regarding how [the agency] will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 191. Nevertheless, the application of this principle in the lower courts has left both property owners and regulators "uncertain of [their] rights under the Takings Clause." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 3 (1995). *See also* Daniel R. Mandelker and Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 ZONING & PLANNING L. REP. 49, 53 (1988) ("[s]ome judges have openly admitted their difficulty in determining when 'enough is enough' under this requirement"); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, PROC. INST. PLANNING, ZONING & EMINENT DOMAIN 7-1, 7-38 (1991) ("courts--even within the same circuit--can read the same Supreme Court [ripeness] decisions and conclude that they mean both 'black' and 'white' simultaneously").

The Ninth Circuit has compounded the confusion by its application of the ripeness doctrine in this case. The court below requires Mrs. Suitum to apply for TRPA's approval of the sale of the agency's administrative credits to another landowner in order to ripen her takings claim. This holding severs the ripeness requirement from its conceptual underpinning--which is to allow courts to analyze takings claims in the context of a definitive determination of the extent of development allowed on the owner's property. The Ninth Circuit has taken a doctrine that aims for certainty and rendered it uncertain, as there is no limit to the number of irrelevant and unavailing procedures that a property owner may be forced to utilize

after an agency has commanded her to leave her land forever in its natural state.

## I

## UNDER *WILLIAMSON COUNTY*, TRPA'S DENIAL OF MRS. SUITUM'S BUILDING PLAN WAS FINAL WHEN THE AGENCY PROHIBITED ANY CONSTRUCTION WHATSOEVER ON HER LAND

In the opinion below, the Ninth Circuit held that the opportunity to market TRPA's administrative credits comprises a "use" of Mrs. Suitum's property, and that she is required to market the agency's credits to a third party and apply for TRPA's approval of the transaction before her takings claim will ripen. *Suitum*, App. 160-61. As authority for this holding the court below cited to the "final decision" requirement first enunciated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 190-94.

The holding below marks a dangerous misinterpretation of *Williamson County*. If the Ninth Circuit's view were to prevail, landowners like Mrs. Suitum could find their takings claims barred from court for failure to pursue an infinite array of trivial and time-consuming administrative procedures, none of which could restore to the owner any beneficial or productive use of the property in question.

### A. In the Context of *Williamson County's* Ripeness Doctrine, "Use" of Property Means Any Economically Feasible Development of the Owner's Land

In *Williamson County*, this Court established that a regulatory takings claim is not ripe for adjudication until the governmental agency has reached "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. Conversely, a property owner does not have a ripe takings claim if she "has not yet obtained a final decision regarding how [she] will be allowed to develop [her] property." *Id.* at 190.

In the proceedings below there was no ambiguity concerning the amount of development that TRPA will allow on Mrs. Suitum's residential lot. The agency's 1987 Plan and Code unequivocally



forbid any "additional land coverage or other permanent land disturbance" on the Mill Creek Estates site.[16] As the District Court acknowledged, Mrs. Suitum "may not develop or build on the parcel of land she owns." 1993 Order, App. 88.

Nevertheless, the trial judge found that, for purposes of the ripeness inquiry, selling TRPA's marketable credits constitutes a "use" of Mrs. Suitum's property, and *Williamson County* bars consideration of her takings claim until such a sale is pursued. *Suitum*, App. 160-61. In affirming this ruling, the Ninth Circuit found that until Mrs. Suitum attempts to market TRPA's credits, the agency will be unable to determine "the *extent of the use*" of her property. *Id.*

This holding conflicts sharply with the language and intent of this Court's ripeness decisions, which have uniformly been concerned with identifying the type and extent of *development* that will be allowed on a plaintiff's real property.

The rule set forth by this Court in *Williamson County* requires a final decision regarding how the property owner will be allowed "***to develop*** its property." 473 U.S. at 190 (emphasis added). In *MacDonald, Sommr & Frates v. Yolo County*, 477 U.S. 340, this Court described the nature of the ripeness inquiry as "an insistence on knowing the nature and extent ***of permitted development***" before adjudicating a takings claim. *Id.* at 351 (emphasis added). A final decision under *MacDonald* is one that leaves no uncertainty concerning "the type and intensity ***of development*** legally permitted on the subject property." *Id.* at 348 (emphasis added). The takings question was found to be unripe in *MacDonald* because under the facts of that case there remained a "possibility that ***some development*** will be permitted." *Id.* at 352 (emphasis added).

The identification of "use" of property with economically feasible development in *Williamson County* and its progeny reflects the fact that this branch of the ripeness doctrine emerged from cases dealing with regulatory restrictions on land development, and has meaningful application only in that context. In *Williamson County*, a developer brought a regulatory takings claim based on the disapproval of a preliminary development plat. 473 U.S. at 182.

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[16] *See* TRPA Code § 20.4, App. 62.

The disapproval was found not to be a final decision because the developer could have sought a variance *which might have permitted further building activity* on some or all of the property in question. 473 U.S. at 188-89, 191. Because the extent of allowable development of the owners' land was uncertain, the takings claim was found to be unripe. *Id.* at 193-94. Similarly, the property owners in *MacDonald* alleged a taking arising from the denial of a subdivision development plan. 477 U.S. at 342-43. This Court again applied the finality doctrine to determine that the case was not ripe because *the planning agency might still approve some economically viable development of the owners' property. Id.* at 352.

The purpose of the "final decision" requirement reflects this Court's concern--evident in the cases that shaped the doctrine--with establishing the extent to which governmental regulation interferes with a citizen's right to build on her own land. This concern is consistent with this Court's

> frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, ***to leave his property economically idle***, he has suffered a taking.

*Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019 (emphasis in original; emphasis added).

The decision below displaces the ripeness doctrine from the context of an inquiry into whether development of the owner's land has been prohibited, and converts it into a requirement resembling administrative exhaustion.[17] The presence or absence of a market for

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[17] "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy." *Williamson County*, 473 U.S. at 193. In the proceedings below both the District Court and the Court of Appeals expressly regarded the TDR program as an "avenue of relief" or "remedy" for TRPA's denial of all beneficial use of Mrs. Suitum's land (App. 150, (continued...)



TRPA's arbitrarily created, intangible entitlements has no bearing whatsoever on whether the agency has reached a final decision denying Mrs. Suitum's application to build on her land. That use of her real property--*which has heretofore been the only use relevant to the finality inquiry*--has been completely foreclosed.

One curious passage in the decision below seems to acknowledge that "use of property" and "feasible development" are synonymous for purposes of ripeness:

> Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of *permitted development*."

*Suitum*, App. 161 (citation omitted; emphasis added). However, it is undisputed that Mrs. Suitum's right to develop her land has been permanently extinguished. 1993 Order, App. 88. Thus, the only plausible interpretation of the above-quoted passage is that the Ninth Circuit equates *Mrs. Suitum's* right to build on her land with TRPA's permission for *any third party* in the Lake Tahoe region to develop his or her property. It is true that TRPA has not reached a final decision regarding whether someone else will be allowed to build *instead of Mrs. Suitum*. But this Court's ripeness formulation requires certainty as to the application of regulations "to ***the particular land in question***." *Williamson County*, 473 U.S. at 191 (emphasis added).

Development of *someone else's* property is not a "use" of Mrs. Suitum's parcel. Such a fundamental misinterpretation of this Court's precedents defeats the underlying rationale of the ripeness doctrine: to determine with certainty "the type and intensity of ***development*** legally permitted ***on the subject property***." *MacDonald*, 477 U.S. at 348 (emphasis added).

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[17] (...continued)
152, 160), suggesting that participating in the program is a form of administrative exhaustion. However, as this Court has often observed, "there is no requirement that a plaintiff exhaust administrative remedies before bringing a Sec. 1983 action." *Id.* at 192 (citing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)).

## B. TRPA Has Unequivocally Deprived Mrs. Suitum of the Right to Build a Home on Her Land

The "final decision" branch of this Court's ripeness doctrine is intended to ensure *certainty* concerning the application of a regulation to the owner's land. *See, e.g.*, William G. Asimakis, Jr., Note, *Electro-Tech v. H. F. Campbell Co.: The Breadth of the Taking Clause as a Conduit to Section 1983*, 1990 DET. C.L. REV. 797, 829 ("[t]he finality requirement of *Williamson County Regional Planning Commission v. Hamilton Bank* was created to dispel any speculation as to what extent the land-use restriction has affected the property owner's reasonably economical use of his land").

The impact of the regulation at issue in *Williamson County* was speculative because the planning agency had denied the owner's development plan based on eight specific objections--at least five of which this Court theorized could have been resolved by obtaining appropriate variances. 473 U.S. at 188. Because no variances were sought, "it was not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance." *Id.* at 191. No comparable uncertainty exists in the case at bar; TRPA's ruling has denied Mrs. Suitum the right to build *any* permanent structure on her land, and no variance, waiver, or other exception to this ruling is possible under the Code.

### 1. TRPA Has Reached a Final Determination That No Development Whatsoever Will Be Permitted on Mrs. Suitum's Land

As the Ninth Circuit acknowledged in the decision below, there is no uncertainty in this case concerning TRPA's prohibition of any productive development of Mrs. Suitum's land, *Suitum*, App. 158. The only source of administrative relief from TRPA's determination that Mrs. Suitum can make no beneficial use of her property is by an appeal to the agency's governing board. 1987 Plan, App. 33-34. Mrs. Suitum filed such an appeal, which was denied. 1993 Order, App. 87 n.3. Under these circumstances, there is *no remaining uncertainty* concerning the impact of TRPA's regulations on Mrs. Suitum's land that could be resolved by forcing Mrs. Suitum to find a buyer for TRPA's credits.



### 2. TRPA Has Specified with Precision the Administrative Credits It Will Allow Mrs. Suitum to Market

Marketing TRPA's credits is clearly not a "use" of Mrs. Suitum's land within the meaning of *Williamson County*. Even if participating in the TDR process *were* such a use, however, the nature and extent of this process is already known with certainty. Under TRPA's Code of Ordinances, Mrs. Suitum is allowed to market a "Land Coverage" credit for 183 square feet of impervious coverage;[18] four "Residential Development Rights," including "bonus" credits;[19] and one "Residential Allocation."[20] These credits are precisely specified and defined in the Code. Mrs. Suitum's authority to market them to a qualified buyer is not a matter of discretion on TRPA's part, but is established by the agency's prior decision categorically depriving Mrs. Suitum of the right to build on her land. Actually marketing or attempting to market the credits will add nothing to the certainty with which TRPA's regulations have been applied to Mrs. Suitum.

### 3. TRPA's Only Remaining Function Is to Confirm That Any Buyer of the Administrative Credits Owns Property That Is "Eligible" to Have Its Development Restrictions Relaxed

The decision below repeatedly requires Mrs. Suitum to *"apply"* to TRPA to participate in the TDR program. Such an application, however, would serve no purpose with regard to establishing whether TRPA had reached a final decision on the application of its regulations to Mrs. Suitum's land.

Applying for TRPA's approval of the marketing of administrative credits does not entail any discretionary determination on the part of the agency. The application that must be submitted is a form confirming that the property of any designated purchaser is

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[18] TRPA Code § 20.3.A, App. 45; § 20.3.C(2)(c), App. 54-55.

[19] TRPA Code § 34.2, App. 69; § 35.2.D, App. 111-12.

[20] TRPA Code § 34.3, App. 70.

"eligibile" to have its development restrictions relaxed. *See* Transfer Application, App. 118. This administrative function has no relevance whatsoever to TRPA's prohibition of all development on Mrs. Suitum's land, which constitutes a final decision within the meaning of *Williamson County's* ripeness doctrine.

**4. Participating in the TDR Scheme Is Not Comparable to Applying for a Variance from the Application of TRPA's Regulations**

This Court in *Williamson County* discussed the need to apply for any available variances that might allow development of the owner's property in order to satisfy the finality doctrine. 473 U.S. at 187-88. The significance of the availability of a variance is that it injects uncertainty into the inquiry concerning the type and intensity of development that will be permitted *on the owner's land*. *Id.* at 188 (variances "would have allowed [plaintiff] to develop the property"). So long as a property owner does not apply for an available variance this uncertainty remains unresolved. Under these circumstances reviewing courts are faced with the dilemma of being unable to determine "how far the regulation goes." *MacDonald*, 447 U.S. at 348. In the case at bar, however, it was conceded in the trial court proceedings that no variances or similar avenues of administrative relief were open to Mrs. Suitum. App. 88, 150.

The Ninth Circuit's equation of TRPA's marketable credits with the availability of variances is inexplicable except as further evidence that the court below regarded Mrs. Suitum's ownership rights as indistinguishable from those of any other property owner in the region:

> Although in the more typical scenario a plaintiff may face a municipal planning board which reviews modified development plans or requests for variances, here, the TDR program effects the same purpose: facilitating alternative uses of the property. ... That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

*Suitum*, App. 161 (emphasis in original).



The only sense in which TRPA's administrative credits are comparable to variances is that, if successfully marketed, they would authorize *some third party* to exceed TRPA's regulatory restrictions on the development of his or her land. Once again, the court below seems to say that Mrs. Suitum's takings claim is not ripe because TRPA has not decided whether *someone else* will be allowed to build.

The TDR program does not disturb the finality of TRPA's decision denying all beneficial use of Mrs. Suitum's land. Because a sale of TRPA's credits cannot be finalized until the seller records a deed restriction or covenant permanently forfeiting her development rights, it is not possible that participating in the TDR program could "unring the bell" and allow Mrs. Suitum to make any use of her property. Likening this process to the application for a variance which might allow Mrs. Suitum to engage in some productive use of her land is an exercise in sheer fantasy.

**C. TRPA's Marketable Credits Are Not a Substitute for Mrs. Suitum's Right to Build a Home on Her Land**

The most fundamental reason that the sale of TRPA's marketable credits cannot be regarded as a "use" of Mrs. Suitum's property is that they *are not her property*. The administrative credits are in no sense a strand in the bundle of rights constituting Mrs. Suitum's ownership of her Mill Creek Estates lot, nor are they a substitute for those rights. Instead, the credits are arbitrary administrative creations embodying TRPA's *restriction* of private ownership rights.

The dominant paradigm of property ownership is that of a "bundle of rights" defining the relationship of the owner to the thing owned. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982); *United States v. General Motors Corporation*, 323 U.S. 373, 378 (1945). *See* Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69 (Pennock & Chapman, eds., 1980). Among the individual strands of this bundle that have been identified and protected by this Court are the rights of possession (*United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951)), exclusion (*Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)), devise (*Hodel v. Irving*, 481 U.S. 704, 716 (1987)), and residential use

(*Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987)).

Under certain circumstances the individual strands in an owner's bundle of rights may be severable and individually alienable. *See, e.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 412 (1922). However, even a cursory examination of the nature of TRPA's marketable credits reveals that these administrative creations correspond to no inherent attribute of Mrs. Suitum's ownership of her land. Indeed, they are administrative devices conceived and implemented to *restrict* her rights of ownership.

Of the three types of credits the court below requires Mrs. Suitum to market, one--a device to limit the amount of annual residential construction in the region--is distributed as a prize in a lottery.[21] Before Mrs. Suitum would even be in a position to market a Residential Allocation, she must first win the drawing by which these Allocations are distributed. The odds of winning an allotment at the 1993 Washoe County drawing were estimated by TRPA's expert at 6 chances in 400 based on the number of unbuildable parcels in the county, or about 1 chance in 5 based on the number of entries. Scholley Aff., App. 146-47. Obviously, any value commanded by a Residential Allocation would be attributable entirely to TRPA's restriction of the annual supply, the number of lots on which TRPA would allow residential construction to occur, and Mrs. Suitum's luck, rather than to any attributes inherent in her ownership of the Mill Creek Estates property.

The second type of marketable credit, a device to limit total residential development in the region, is a mere administrative contrivance, created and multiplied entirely at TRPA's discretion.[22] As the owner of property within a designated Stream Environment Zone, Mrs. Suitum qualifies for an entitlement to market three

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[21] "Residential Allocations," Barnett Aff., App. 99. Although Mrs. Suitum obtained a Residential Allocation in 1989 as the first step in applying to build her retirement home, this credit expired more than six years ago. Scholley Aff., App. 146.

[22] "Residential Development Rights" (RDRs), TRPA Code § 34.2, App. 69-70; Chap. 35, App. 109.



"bonus" RDRs.[23] These credits are part of a pool of 1,600 such units TRPA created out of thin air,[24] as a convenient way to implement its policies of restricting overall residential development. Scholley Aff., App. 147. The code does not specify why the number of RDRs awarded to Mrs. Suitum should be 3 instead of 2, or 12; the number of units is wholly arbitrary, bearing no inherent relationship to Mrs. Suitum's property or to her right to develop it.

The third credit Mrs. Suitum is required to market is a device to help TRPA implement its policy of limiting the placement of impervious ground coverage in the Lake Tahoe area.[25] If marketed, this credit would convey to its hypothetical buyer a dispensation allowing him or her to lay down additional impervious coverage equal to 1% of the area of Mrs. Suitum's lot--183 square feet.[26] Thus, this credit amounts to a marketable coupon authorizing a third party to, in effect, add a 12' x 15' bedroom to her home. Such authorization obviously originates entirely in TRPA's willingness to waive its restrictions on other people's property, not in any plausible strand of the bundle of rights inhering in Mrs. Suitum's ownership of her subdivision lot.

A cornerstone of any meaningful regime of private property is the recognition that the right to use property is an inherent attribute of ownership. *See, e.g.*, Robert Nozick, *Anarchy, State, and Utopia* 171 (1974) ("[t]he central core of the notion of a property right in X ... is the right to determine what shall be done with X"); *United States v. Causby,* 328 U.S. 256, 261 (1946). If this recognition is denied, then the ability to use property is no more than a government privilege or entitlement. Property ownership without the right of use would be an empty formalism, incapable of performing its crucial

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[23] Barnett Aff., App. 98.

[24] TRPA Code § 35.2.A, App. 109.

[25] "Land Coverage," TRPA Code §§ 20.3-20.4, App. 45-68.

[26] Barnett Aff., App. 96-97.

social function of providing a bulwark of personal autonomy against the encroachments of an aggressive, overreaching state.[27]

The essence of TRPA's marketable credits is that they authorize *their purchasers* to engage in more extensive development of their property than TRPA would otherwise allow. But clearly, such authority is not Mrs. Suitum's to grant. Whatever development rights the buyers of TRPA's credits possess stem from their ownership of their own land, land that Mrs. Suitum does *not* own. The authority for a third party to exceed the regulatory restrictions imposed by TRPA is patently not an element in the bundle of rights comprising Mrs. Suitum's ownership of property, and the opportunity to sell such an authorization therefore cannot logically be construed as a "use" of her property.

## II

## THE TDR SCHEME IS A SALE OF VARIANCES TO THIRD PARTIES, NOT A TRANSFER OF ANYONE'S DEVELOPMENT RIGHTS

In the decision below, the Ninth Circuit found that Mrs. Suitum could not know the extent of TRPA's restriction of the use of her land "[w]ithout attempting to transfer the rights she currently possesses." *Suitum*, App. 161. This statement betrays a fundamental misunderstanding of TRPA's "transfer of development" program.

The right to develop one's land, an essential strand in the bundle of rights comprising ownership of real property, must not be confused with the marketable credits TRPA has created. In their conception and implementation, these credits originate as *restrictions* on the right to develop one's own property. When marketed, they represent *variances* from restrictions on development of the purchaser's land.

As has been noted in the literature, the term "transfer of development rights"

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[27] *See* Friedrich A. Hayek, *The Road to Serfdom*, 103-04 (1944) (system of private property rights assures "that nobody has complete power over us, that we as individuals can decide what to do with ourselves").



> misrepresents the nature of the transaction. It is not so much the development right that is being transferred, but rather the development restriction that is removed from the transferee parcel and placed onto the transferor parcel.

Michael D. Struger, *TDRs: Robbing Peter to Pay Paul*, 62 U. DET. L. REV. 633, 643 (1985). Thus, the fact that Mrs. Suitum has not attempted to sell a variance (in the form of a marketable credit) to another property owner does not mean that she retains any untapped viable use of her own property--she doesn't. Mrs. Suitum's right to build on her land has been totally and permanently extinguished by the application of TRPA's regulations, leaving her with no development rights to "transfer." 1993 Order, App. 88. Pursuing TRPA's marketing scheme to its conclusion *cannot* result in a transfer of Mrs. Suitum's development rights, but only in the sale of a variance from TRPA's restrictions on the buyers' property.

By its application of the same "command and control" regulatory regime that extinguished Mrs. Suitum's rights, TRPA has arbitrarily abridged the development rights of other owners of undeveloped land throughout the Lake Tahoe region, denying them the full exercise of the development rights inherent in the ownership of their property. The essence of the TDR scheme is that if Mrs. Suitum can find buyers for TRPA's credits, the agency will agree to relax its restrictions on the buyers' property--in effect selling a variance *to the buyer* for cash paid to Mrs. Suitum. Such a transaction, if one actually occurred, would transfer no rights; Mrs. Suitum's development rights are gone forever, while the buyers would merely be allowed to exercise their own rights to a greater extent than before.

Nothing about this trilateral variance-for-cash scheme can remotely be considered a "use" of Mrs. Suitum's lot. The TDR program is simply a mechanism for marketing indulgences which allow their buyers to exceed the limits TRPA has arbitrarily imposed on the development of their own land.

## III

## ANY VALUATION ISSUES RAISED BY THE TDR PROCESS CAN READILY BE RESOLVED AT TRIAL WITHOUT REQUIRING MRS. SUITUM TO ENGAGE IN A MARKET TRANSACTION

The decision below requires Mrs. Suitum to obtain TRPA's approval of a proposal to market the agency's administrative credits to *establish their value* before she can bring her takings claim to court. *Suitum*, App 163. This adds an unprecedented and unsound appendage to this Court's ripeness doctrine, which heretofore has required only certainty as to the limitations that will be placed on a plaintiff's right to develop her land.

TRPA's approval process has nothing to do with either the use of Mrs. Suitum's land or the value of the administrative credits she has been authorized to market. TRPA approves only the eligibility of the purchaser's property to make use of the variances the agency has authorized Mrs. Suitum to sell. Valuation of any property interests involved--either of Mrs. Suitum's land or of TRPA's marketable credits--can readily be determined through normal appraisal methods without engaging in an actual market transaction. Adding an "actual sale" requirement to the ripeness doctrine would--at best--needlessly delay access to the courts for property owners whose development rights have been extinguished by government action.

Of even greater concern, TRPA's program requires Mrs. Suitum to execute a deed restriction or covenant permanently waiving her right to develop or alter her property before she can sell any of the agency's credits. Forcing Mrs. Suitum to alienate her property interests before she can bring her case to court would deprive Mrs. Suitum of her due process remedy, might foreclose her claim altogether, and conflicts with the salutory policy of providing the government with an opportunity to rescind its regulatory restrictions, thereby incurring liability for only a temporary taking. *Lucas*, 505 U.S. at 1053 n.17; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).



### A. The Economic Impact of a Regulation Can Be Established by Ordinary Appraisal Methods Without Requiring an Owner to Alienate Her Property Interests

Although both TRPA and Mrs. Suitum submitted evidence to the District Court concerning the value of the agency's marketable credits, *Suitum*, App. 162, the trial court concluded that their value could not be determined without pursuing an actual market sale. 1994 Order, App. 153. The Ninth Circuit endorsed this error, apparently basing its holding on the assumption that the value of intangible assets cannot be determined by a court unless they are actually sold. *Suitum*, App. 163. This implicit assumption conflicts with the routine judicial practice of valuing assets--including property in inverse condemnation cases--by expert appraisal without the necessity of an actual sale.

Determining the value, if any, of TRPA's marketable credits is no different from determining the value of any other good or service. Such valuations are routinely performed in judicial proceedings without the benefit of an actual market transaction. *See, e.g., Florida East Coast Properties v. Metropolitan Dade County*, 472 F.2d 1108, 1110 (5th Cir. 1978) (trial court received expert testimony and appraisals of the economic impact of jail construction on the value of nearby residential property); *United States v. 42.13 Acres of Land*, 73 F.3d 953, 955 (9th Cir. 1996) (valuation of property taken by inverse condemnation "based on an appraisal completed by [plaintiff's] experts analyzing fair market value between a willing buyer and a willing seller").

In the proceedings below, TRPA proffered the opinion of its expert that the administrative credits the agency granted to Mrs. Suitum are worth "from $10,000 to $21,500 or more" without a Residential Allocation, and would be worth an additional $30,000 if Mrs. Suitum were the lucky winner of such an Allocation at a drawing. App. 162-63. Mrs. Suitum's witness estimated the market value of the same credits at $2,500 to $7,500 "under the best of

circumstances." Declaration of Paul Kaleta (Kaleta Decl.), App. 137.[28] Faced with conflicting evidence, the District Court needs only to fulfill its its normal fact-finding role and determine the most credible valuation at trial.

The holding below, that Mrs. Suitum must actually market TRPA's credits to establish their value and thus ripen her takings claim, has no basis in *Williamson County's* ripeness doctrine. The value of both Mrs. Suitum's land *and* TRPA's administrative credits could be fully determined at the time Mrs. Suitum filed her takings claim, without recourse to a third-party market transaction. By insisting that valuation must be established through market sales instead of expert appraisal, the decision below distorts *Williamson County* by adding an additional, unnecessary step that this Court has never required to establish a ripe takings claim.

That this is a pointless and unwarranted extension of the ripeness doctrine is illustrated by the conflicting treatment of this issue by the Seventh Circuit Court of Appeals. Faced with a takings challenge to a similar regulatory restriction, the Seventh Circuit has correctly held that ripeness does *not* require an owner to alienate his property interest in order to ripen his takings claim. In *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995), the owner of a liquor license alleged that an ordinance restricting the transfer of such licenses in certain Chicago neighborhoods--nonrelatives could acquire no more than a 5% interest in each year--worked a regulatory taking. 55 F.3d at 260. The District Court dismissed the case as unripe "because Marusic has no immediate plan to sell the business." *Id.* The Court of Appeals reversed, expressly finding the case ripe under *Williamson County* even though the owner had not attempted to sell his license. *Id.* at 261. The court held that "the ordinance itself embodies a conclusive decision about transferability" that had immediate impact on the value of the business even though it was "an

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[28] This evidence was excluded by the trial court because Mrs. Suitum's witness was held to lack the necessary qualifications to offer expert testimony on valuation. *Suitum*, App. 162. However, the affadavit of TRPA's expert was admitted into evidence, confirming that there is no difficulty *in principle* in valuing the agency's credits. *Id.*, App. 162-63.



open question whether, and if so when, Marusic will try to sell the store." *Id.*

In the case at bar the provisions of the TRPA Code creating the TDR program similarly "embod[y] a conclusive decision about transferability." These provisions define with specificity the credits that Mrs. Suitum would be allowed to market and the qualifications of any potential recipients. Mrs. Suitum is no more required to sell these credits to ripen her claim than Mr. Marusic was required to sell his store before challenging the regulatory restrictions at issue.

### B. Complying with the Ninth Circuit's "Actual Sale" Requirement Could Deprive Property Owners of Constitutionally Mandated Remedies and Deprive Public Agencies of Flexibility to Limit Their Liability for Damages

The decision below effectively requires Mrs. Suitum to divest herself permanently of the very rights she claims TRPA has unconstitutionally abridged, as a condition precedent to challenging the agency's abridgment of those rights.

Before TRPA can approve any application to sell the agency's administrative credits, Mrs. Suitum would be required to "permanently retire" her property from development.[29] Permanent retirement means formally renouncing her development rights:

> For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be recorded by the owner.[30]

As one of TRPA's experts puts it, "the parcel must be greenbelted by the recordation of an open space easement across the parcel." Affidavit of Stephen R. Johnson in Support of Motion for Summary

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[29] Barnett Aff., App. 99; TRPA Code § 34.2.B, App. 69; § 34.5.B(1), App. 73; § 34.5.H, App. 75.

[30] TRPA Code § 34.5.H(1), App. 75.

Judgement (Johnson Aff.), App. 130. The greenbelting must be complete "at the time of transfer."[31]

The complaint Mrs. Suitum filed with the District Court included a due process cause of action, seeking relief in the form of an order invalidating TRPA's application of its regulations to her property, and requiring the agency to permit her to proceed with the construction of her home. First Amended Complaint, ¶¶ 11-12, App. 16. However, if Mrs. Suitum complies with the Ninth Circuit's "actual sale" extension of the ripeness doctrine, this remedy would be foreclosed. Having executed a deed restriction or covenant permanently alienating her right to develop her Mill Creek Estates lot as the price of getting her takings claim into court, Mrs. Suitum would no longer have standing to assert her right to build her retirement home on her land.

In addition to the manifest injustice of this result, such a "Catch-22" ripeness requirement invites the argument that Mrs. Suitum's takings claim would be moot once she has permanently divested herself of the right to build on her land. Without owning land on which she could build, it would be difficult or impossible for Mrs. Suitum to invoke the jurisdiction of a court to hear her claim that her development rights had been "taken" by TRPA's regulations. U. S. Const. Art. III, § 2, cl. 1.

In the alternative, assuming that a plaintiff would *not* be barred from court after complying with the Ninth Circuit's "actual sale" requirement, such a process would conflict with the express policy of this Court of allowing agencies the option to *rescind* regulatory acts that are found to violate the Takings Clause, thereby limiting their liability for damages:

> Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation.

*Lucas*, 505 U.S. at 1053 n.17. The ability of the regulatory entity to opt to rescind an unconstitutional enactment is part of the legislative flexibility traditionally respected and fostered by this Court:

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[31] TRPA Code § 34.2.B, App. 69.



> Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 321.

The decision below, which would strip Mrs. Suitum of her property interests as a condition of granting her access to the courts, would also deprive TRPA of any option but payment of full compensation for a permanent taking if Mrs. Suitum's claim prevails. This is an unsound result from the perspective of either the parties or society as a whole, and conflicts with this Court's long-standing regulatory takings jurisprudence.

The Ninth Circuit's ruling that a property owner must alienate her property interest--without compensation from the government--before she can challenge the constitutionality of the government's actions depriving her of any use of that interest is wholly alien to this Court's regulatory takings jurisprudence. If TRPA wishes to require Mrs. Suitum to permanently deed over the development rights to her land, the proper course is for the agency to condemn the property and pay Mrs. Suitum just compensation. *See Pennsylvania Coal*, 260 U.S. at 413 (when regulatory diminution of an owner's property rights "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act").

A process that requires a landowner to formally renounce any beneficial use of her land cannot, in keeping with the ordinary meaning of the English language, be deemed a "use" of the property in question. Such a process is clearly not a use of Mrs. Suitum's land within the meaning of this Court's finality ripeness doctrine.

## IV

## IF THE OPPORTUNITY TO MARKET A PUBLIC AGENCY'S ADMINISTRATIVE CREDITS IS HELD TO CONSTITUTE A BENEFICIAL USE OF LAND, IT WOULD VITIATE THE CATEGORICAL TAKINGS DOCTRINE OF *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

In addition to conflicting with the language and rationale of *Williamson County's* ripeness doctrine, the decision below calls into question the viability of the substantive takings rule set forth by this Court in *Lucas v. South Carolina Coastal Council*, that the regulatory denial of all economically beneficial use of land is a *per se* violation of the Takings Clause. 505 U.S. at 1015. If TRPA can contrive a legally cognizable "use" of Mrs. Suitum's land by (in effect) printing coupons and requiring her to market them, the agency can just as reasonably claim that its *fiat* administrative credits constitute an economically viable use of her land under *Lucas*. Such a ruse--which could instantly be implemented by every land use regulatory board in the United States--would render this Court's categorical takings doctrine a nullity.

### A. Under This Court's *Lucas* Decision, TRPA's Outright Prohibition of Any Economically Beneficial Development of Mrs. Suitum's Land Is a *Per Se* Regulatory Taking

In *Lucas*, this Court held that a regulation that deprives an owner of all economically productive use of her land is the equivalent, for Takings Clause analysis, of a forced physical occupation:

> We have ... described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. ... The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

*Lucas*, 505 U.S. at 1016. The facts in *Lucas*, in which South Carolina's Beachfront Management Act prohibited David Lucas from



building a house on his residential lot in a fully developed subdivision, are almost eerily similar to those in the case at bar:

> The plaintiff [is] an individual who want[s] to build a house on [her] land. [Her] neighbors ha[ve] houses on their property, and the governing law at the time [she] purchased [her] lot did not bar such construction.

Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1425 (1993).

In determining whether a categorical taking had occurred, this Court in *Lucas* focused on the law's impact on the owner's options for making actual, physical use of the land being regulated. A *per se* regulatory taking was found to occur when

> regulations ... leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state.

*Lucas*, 505 U.S. at 1018. The essence of this inquiry is whether the owner can engage in any productive, beneficial activity *on his land:* "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, *to leave his property economically idle*, he has suffered a taking." 505 U.S. at 1019 (emphasis added).

Mrs. Suitum's case falls squarely within the *Lucas* category of *per se* Takings Clause violations. Because of TRPA's restrictions, she "may not develop or build on the parcel of land she owns." 1983 Order, App. 88. Even to participate in the TDR scheme, Mrs. Suitum must "permanently retire" her property from development.[32] In short, she can make no beneficial use of her land under any circumstances. By classifying Mrs. Suitum's subdivision lot as a Stream Environment Zone with an IPES rank of zero, TRPA rendered the property literally *useless*. This is identical to the effect of the Beachfront Management Act in prohibiting all new "occupiable improvements" on David Lucas' land. *Lucas*, 505 U.S. at 1009.

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[32] TRPA Code § 20.3.C(7)(a), App. 57; § 34.2.B, App. 69; § 34.5.A, B, H, App. 73, 75.

There is disagreement in the record below concerning Mrs. Suitum's remaining ability to engage in trivial, ancillary activities like setting a picnic table on her land.[33] There is no question, however, that she is barred from constructing a home on her residential homesite--Mrs. Suitum's expectation when she purchased the property, and the benefical use consistent with the character and zoning of the surrounding neighborhood. In *Lucas*, this Court recognized that building a home on one's own property is an "essential use of land." 505 U.S. at 1031. Although this insight has been disputed,[34] the right to use residential property for this purpose is one that has always been subject to special constitutional protection. *See Nollan v. California Coastal Commission*, 483 U.S. at 833 n.2. The obliteration of this right by TRPA's actions in this case would clearly fall within this Court's *per se* takings rule under *Lucas*.

**B. If TRPA Can Render Mrs. Suitum's Takings Claim Unripe Under *Williamson County* by Creating Administrative Credits and Requiring Her to Market Them, It Can Just as Easily Evade This Court's Categorical Takings Rule Under *Lucas***

Almost as soon as the *Lucas* doctrine was announced, self-proclaimed regulatory activists began advocating TDR schemes as a means of evading the impact of this Court's ruling.[35] This campaign has come to fruition in the decision below, which would create such

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[33] *Compare* Scholley Aff. at ¶ 17, App. 149 (picnic table can be placed on SEZ property) *with* Kaleta Decl. at ¶ 5, App. 136 (no picnic table allowed).

[34] *See, e.g.*, Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. at 1424 (characterizing the residential use of residential subdivision lots as "dim-witted rather than 'essential'").

[35] *See, eg.*, Steven R. Levine, *Environmental Interest Groups and Land Regulation: Avoiding the Clutches of Lucas v. South Carolina Coastal Council*, 48 U. MIAMI L. REV. 1179, 1182 (1994) (advocating "expansive" land use regulations that employ a TDR scheme as an "administrative option" to render *Lucas* "inapplicable").



a gaping exception to *Lucas'* categorical takings rule as to render it virtually impossible for any property owner to state a takings claim under this standard.

If the opportunity to sell a zoning variance to another landowner is deemed a "use" of one's land for ripeness purposes, then no regulatory regime could be said to foreclose all beneficial use of any individual's land so long as the regulatory agency fabricates a system of marketable credits. Under the reasoning of the decision below, regulators could completely strip an owner of the right to make any use of her land whatsoever, yet evade *Lucas'* categorical takings rule by offering her, as a substitute for her development rights, a bundle of credits that might (or might not) be of some conceivable use to *other* owners.

The core doctrinal rationale of *Lucas* is that the complete extinguishment of an individual's right to make productive use of her land is, "from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017.[36] That comparison is especially apt in the case at bar, for TRPA's regulations allow Mrs. Suitum to make no more use of her land than if a company of troops had permanently encamped there. In the latter case, the government could not escape liability for a *per se* taking by simply handing Mrs. Suitum a book of coupons that might reduce the number of troops that could be quartered on *other* people's land. If a TDR program would not prevent Mrs. Suitum from bringing a ripe claim for a categorical *physical* taking, it should not be sufficient to bar a categorical takings claim based on the complete deprivation of her right to build on her land.

The essence of a categorical taking--whether by physical invasion or by denial of economically beneficial use of an owner's land--is the government's assertion of *dominion* over the land, to the exclusion of the otherwise legitimate preferences and expectations of the landowner. There is a qualitative difference between legitimate

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[36] *See also United States v. Causby*, 328 U.S. at 261 ("[If] respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.").

police power restrictions on property use and the unilateral assertion of complete governmental control over privately owned land. As this Court noted in *Loretto*, "[t]o require that the owner permit another to exercise complete dominion literally adds insult to injury." 458 U.S. at 436. No greater governmental intrusion is possible than when a public agency confiscates all meaningful decision-making authority over private land for its own purposes. For this reason, a regulatory action that completely divests an owner of any meaningful control over the use of her land has uniformly been held to comprise a categorical taking under the Fifth and Fourteenth Amendments, whether under the doctrine of *Loretto* or of *Lucas*.

The decision below, while ostensibly directed to the question of ripeness, is plainly at odds with this Court's *per se* regulatory takings doctrine. Participating in TRPA's marketable credit program is irrelevant to TRPA's assertion of complete dominion over Mrs. Suitum's property, and cannot be considered a residual "use" of her land *either* for purposes of establishing ripeness under *Williamson County* or for establishing *per se* takings liability under *Lucas*.

## CONCLUSION

For all the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit in this matter should be REVERSED.

DATED: November, 1996.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

BERNADINE SUITUM,
Petitioner,
v.
TAHOE REGIONAL PLANNING AGENCY,
Respondent

**On Writ of Certiorari To
The United States Court of Appeals
For the Ninth Circuit**

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

Whether petitioner's as-applied regulatory takings claim is ripe when the merits of that claim turn on her contention that the transferable development rights (TDRs) to which she is entitled are a "ruse" lacking any market value, yet she has declined to make any effort to sell those TDRs she already possesses, to exercise her opportunities to obtain additional TDRs, or to apply for agency approval of any TDR sales.

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## ORDINANCES AND CONSTITUTIONAL PROVISION INVOLVED

The relevant provisions of the Tahoe Regional Planning Agency Code of Ordinances are excerpted in an appendix to this brief.[1] The Fifth Amendment of the United States Constitution provides that "nor shall private property be taken for public use, without just compensation."

## STATEMENT

Petitioner Bernadine Suitum filed this regulatory takings claim, contending that the Tahoe Regional Planning Agency's application of restrictions on development in stream environment zones amounts to an unconstitutional taking of her private property for public use, requiring the payment of just compensation under the Fifth and Fourteenth Amendments. The district court dismissed her complaint for lack of ripeness. The court of appeals affirmed.

### 1. Lake Tahoe and the Tahoe Regional Planning Agency

a. Lake Tahoe: Ever since John Fremont described his first sighting of Lake Tahoe, on February 14, 1844, the "Lake of the Sky" has captured the American imagination because of its unique and wondrous beauty. George W. James, The Lake of the Sky: Lake Tahoe 22 (Rev. Ed. 1956); J.A. 24. "Surely * * * the fairest picture the whole earth affords," Mark Twain wrote, in describing the Lake's "dazzling, brilliantly" transparent water where at "even

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[1] Because the TRPA Code of Ordinances may not be readily available to the Court, the appendix includes lengthy excerpts from Code provisions. In addition, the complete TRPA Goals and Policies and the TRPA Code of Ordinances have been lodged with the Court.

eighty feet deep[, e]very little pebble was distinct, every specked trout, every hand's breadth of sand." Mark Twain, Roughing It, 659, 654 (Library of America ed. 1984).

Lake Tahoe lies between the Sierra Nevada mountains to the west and the Carson Range to the east. It is the largest alpine lake in the world based on all of its physical dimensions, including depth and volume of water. Comment, Carl R. Pagter & Cameron W. Wolfe, Jr., *Lake Tahoe: The Future of a National Asset -- Land Use, Water, and Pollution*, 52 Cal. L. Rev. 563, 564 (1964). The Lake is as high as 6229 feet above sea level and contains approximately 126 million acre-feet of water at an average depth of 1027 feet and a maximum depth of 1645 feet. The Lake is 12 miles wide and 22 miles long, with 71 miles of shoreline and 192 square miles of surface.[2]

Lake Tahoe is "ultraoligatrophic," possessing extraordinarily clear and high quality waters because of very low concentrations of sediments, nutrients (especially nitrogen), and other contaminants. The low nutrient concentrations lower algal productivity, which, in turn, raises oxygen content. One major reason for the low level of nutrients is that the Lake Tahoe Basin offers a relatively small land surface area surrounding the Lake from which nutrient-contaminated runoff can flow into the Lake. Another reason is that riparian biologic communities in the area, known in the Basin as "stream environment zones" (SEZs), naturally absorb and thereby reduce the amount of sediment, nutrients, and other contaminants in the surface runoff into the Lake. There are approximately 17,700 acres of SEZ out

[2] See Douglas H. Strong, Tahoe: An Environmental History, -- (1984); S. Rep. No. 91-510, 91st Cong., 1st Sess. 3-4 (1969); H.R. Rep. No 91-650, 91st Cong., 1st Sess. 2-3 (1969); Comment, *Lake Tahoe: The Future of a National Asset, supra*, at 563-565.



of a total of 205,250 acres in the entire Basin.[3]

For these same reasons, however, "[t]he combination of weather, terrain, and vegetation together with highly erod[i]ble soils create within the basin a fragile environment." H.R. Rep. No. 91-650, *supra*, at 3. Disturbance of the natural surface soils and vegetation and the addition of impervious coverage in the Basin, especially in SEZs, has immediate and dramatic adverse consequences for water quality. The nutrients, sediment, and other contaminants in runoff flow into the Lake rather than being retained in SEZs. SEZs also represent a potent reserve of sediments and nutrients, based on years of their retaining these contaminants, which, once disturbed, are easily transported by runoff into the Lake. *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. at 641, 855 P.2d at 1029; J.A. 22-23 (Tahoe EIS); I Tahoe Regional Planning Agency, Water Quality Management Plan for the Lake Tahoe Region -- 208 Plan, 94 (1988) ("TRPA 208 Plan"); John Ayer, *Water Quality Control at Lake Tahoe - Dissertation on Grasshopper Soup*, 1 Ecology L. Q. 3, 5-9, 37-39 (1971).

The aging process of the Lake -- eutrophication -- dramatically increases with the addition of these contaminants. Algae growth increases, clarity decreases, as does water quality more generally. These adverse effects are also potentially long lasting, if not irremediable. Because Lake Tahoe has only one natural outlet, the Truckee River, the Lake has a sharply reduced ability to cleanse itself once

[3] See J.A. 22-24 (excerpts from TRPA, Environmental Impact Statement for Adoption of a Regional Plan for the Lake Tahoe Basin (February 1983) (Tahoe EIS)); *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 641, 855 P.2d 1027, 1028-1029 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994); I Tahoe Regional Planning Agency, Water Quality Management Plan for the Lake Tahoe Region -- 208 Plan, 28, 94 (1988).

contaminated. Retention and flushing time is roughly 700 years, meaning that it takes approximately that amount of time for the Lake to fill itself (compared to 2.6 years for Lake Erie). I TRPA 208 Plan, *supra*, at 72-74; Ayer, *supra*, at 8.

The need for coordinated, carefully planned, and regulated development of properties affecting the Tahoe Basin and the Lake has been correspondingly great. Until relatively recently, however, there was very little coordination and planning and the Basin and Lake were the object of unrestrained waves of development -- mining, lumber, and, tourism -- since the late 19th century. J.A. 24; Strong, *supra*, at 19-55.

The political dimensions of the Lake exacerbated the complex ecological problem. "[T]he Basin is bisected by the California-Nevada line and politically subdivided by five counties and innumerable districts." 115 Cong. Rec. 33067 (1969) (remarks of Sen. Bible). Consequently, it was "impossible to mount a unified, coordinated control of this development." *Id.*

During the 1960s, it became apparent that time was "running out" for Lake Tahoe and the Tahoe Basin. 115 Cong. Rec. 33067 (1969) (remarks of Sen. Bible). The Basin witnessed "phenomenal growth and development," which was "indiscriminate" and "largely uncontrolled." *Id.*; *id.* at 33068 (remarks of Sen. Cannon). Left unchecked, "rapid population growth and accompanying commercial and residential development * * * posed a serious threat to the Lake Tahoe Basin's fragile ecology." S. Rep. 91-510, *supra*, at 5; H.R. Rep. No. 91-650, *supra*, at 4.

"Ominous signs of water pollution [were] becoming all too evident. * * * Tree removal, excavations, highway



construction, landfill, and other development activities ha[d] scarred the basin slopes and triggered destructive erosion." S. Rep. 91-510, *supra*, at 5. The water quality of the Lake was dramatically decreasing. The eutrophication process was accelerating. The clarity of the water was itself decreasing by over half a meter a year. Tahoe stood "in grave danger before a mounting wave of population and development" (*Younger v. El Dorado*, 5 Cal.3d 480, 486, 487 P.2d 1193, 1195, 96 Cal. Rptr. 553, 555 (1971)), which threatened both economic and ecologic collapse.

b. The Tahoe Regional Planning Agency and the Tahoe Regional Planning Compact: Nevada and California responded to the emerging crisis by entering into the Tahoe Regional Planning Compact, which Congress approved in 1969 as an interstate compact pursuant to the Compact Clause, U.S. Const. art. I, § 10, cl.3. See Pub. L. 91-148, 83. Stat. 360 (1969). The purpose of the legislation was to create a single bi-state agency, the Tahoe Regional Planning Agency (TRPA), empowered to craft a unified development plan for the entire region. The TRPA is neither a federal agency nor "an arm of the State subject to its control." See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). The TRPA is instead akin to a "political subdivision" of two states, "comparable to a county or municipality," which "exercise[s] a 'slice of state power.'" *Id.* at 400.

The TRPA adopted a regional plan in 1972, which called for more stringent limitations on development including on those parcels, such as SEZs, most likely to result in significant degradation of Lake Tahoe's waters. But these early planning efforts were largely ineffective due to structural problems in the 1969 Compact that limited TRPA's ability to prevent harmful development. See Gary A. Owen, Tahoe Regional Planning Agency, California Envt'l Law &

Land Use Practice, § 64.04[6], pp. 64-18 to 64-19 (1990).

Lake Tahoe's problems worsened during the 1970s, as documented by a series of federal, regional, and state environmental studies. A 1974 TRPA report identified development in SEZs as a major source of the Lake's problems. An United States Environmental Protection Agency report recommended the development and establishment of enforceable standards for the protection of Lake Tahoe -- referred to as "environmental thresholds" -- to control growth, which had been missing from the 1969 Compact. Strong, *supra*, at 173, 184-185. By 1980, water quality in the Lake was rapidly declining; eutrophication was increasing; and, water clarity had decreased between 6-13 percent in the preceding 15 years. *Id.* at 186-187.

California and Nevada responded to the deepening crisis by amending the 1969 Compact, which Congress approved in 1980. Pub. L. 96-551, 94 Stat. 3233 (1980). Congress found that the "waters of Lake Tahoe * * * are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region." 1980 Compact, art. I(a). The 1980 Compact significantly strengthened and broadened the powers of the TRPA. See arts. III(g), V(b), V(c), V(g), VI(a)&(b). The 1980 Compact also required the TRPA to enact a binding plan that barred any development that failed to contribute to attaining or maintaining specific "environmental threshold carrying capacities." *Id.* arts. I(b), V(b), V(g).[4]

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[4] "'Environmental threshold carrying capacity' means an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise." 1980 Compact, art. II(i).



c. The 1987 TRPA Plan: Pursuant to the 1980 Compact, the TRPA adopted environmental threshold carrying capacities for the Tahoe Region in 1982 and a new regional plan in 1987.[5] The 1987 TRPA Plan resulted from several years of "Consensus Building Workshops" in which conservation and property rights interests, federal, state and local government representatives, utilities, and other community and business interests met to discover common ground. See Owen, *supra*, at § 64.06[3], p. 64-31; I TRPA 208 Plan, *supra*, at 3. Based on those workshops and the resulting recommendations, the TRPA developed "Goals and Policies" in 1986 and a comprehensive "Code of Ordinances" in 1987. *Id.*

Fundamental to the 1987 TRPA Plan is the requirement that development restrictions "must contribute to attaining or maintaining" the "environmental thresholds" required by the 1980 Compact. TRPA Code § 6.3. The TRPA, accordingly, must disapprove any project inconsistent with that requirement. *Id.*

One way that the 1987 TRPA Plan seeks to attain the environmental threshold relating to Lake Tahoe's water quality is by restricting existing and future residential,

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[5] The TRPA first issued a new regional plan in 1984, but a federal district court enjoined its implementation after only three days in response to a lawsuit brought by the California Attorney General and an environmental organization. The court agreed with the plaintiffs that the 1984 plan failed to meet the 1980 Compact's strict environmental requirements of enforceable "thresholds." See *People of the State of California v. Tahoe Regional Planning Agency*, Nos. S-84-0561-EJG (E.D. Cal. June 15, 1984), aff'd, 766 F.2d 1308 (9th Cir. 1985). The practical effect was a moratorium on all development, except pursuant to case by case judicial review, until 1987, when TRPA promulgated the 1987 TRPA Plan, which is the subject of this litigation. Adoption of the 1987 TRPA Plan led to settlement and dissolution of the injunction.

commercial, and tourist accommodation development in the Tahoe Basin. See generally, Rachelle J. Nicolle, *Seeing Pebbles At Eighty Feet - The Tahoe Regional Planning Agency*, Land Use & Environment Forum, 17-18 (Summer 1996). With regard to future residential development, in particular, the plan seeks to accomplish three major objectives: (1) to place a ceiling on the total amount of residential development that may occur in the Basin; (2) to control the pace of development by limiting the number of building permits that may be issued each year; and (3) to limit the amount of impervious coverage resulting from permitted development. A major tool for achieving the water quality goal is prohibiting further development in SEZs.

Eligibility of a particular parcel for future residential development turns on an assessment of the physical suitability of the parcel for such development. To build a single family home or other residential unit, a property owner must have three rights: a "residential development right," a "residential allocation," and "land coverage."

A "residential development right" represents the right to have a residential unit on an eligible parcel of land. A "residential allocation" is necessary to construct a residence in a specific calendar year. "Land coverage" is the maximum percentage of impervious coverage of the surface allowed. These three property interests correspond to the 1987 Plan's objectives of limiting long term residential development, the annual pace of that development, and the amount of impervious coverage.

Although each private owner of a vacant residential parcel automatically receives one "residential development right" (TRPA Code § 21.6.A), entitlement to a "residential allocation" and to "land coverage" turns primarily on an individual assessment of the parcel's suitability for



development. Each parcel receives a numeric score -- Individual Parcel Evaluation System (IPES) -- that reflects the predictable effect of the parcel's development on the water quality of the Lake. TRPA Code Chap. 37. The IPES score determines the "land coverage" assigned to that parcel. TRPA Code §§ 20.3.A(4), 37.11. The IPES score is also relevant to the parcel's eligibility for receiving a "residential allocation" in a specific calendar year. *Id.* § 37.8.

There are a total of 300 residential allocations available each year in order to control the pace of development. TRPA Code § 33.2.A(3). Only parcels with a certain minimum score are eligible for development in a given year. *Id.* § 37.8.E The minimum score may decrease over time if certain conditions are met. *Id.* § 37.8.C. A "stream environment zone" (SEZ), however, receives a score of zero and is ineligible for residential development at any time. *Id.* § 20.4.3.

The 1987 TRPA Plan combines development restrictions with significant property rights enhancements designed both to achieve a more equitable sharing of the burdens and benefits resulting from the restrictions and to steer residential development to the most physically suitable locations. Every property owner is allowed to sell certain transferable development rights (TDRs) to owners of other eligible properties. There are three potentially transferable development rights: residential development rights; residential allocations; and land coverage. A property owner may sell his "residential development right." A likely purchaser of such a right would be an individual who wants to have more than one residential unit on his property. *Id.* §§ 21.6.C, 34.2. A property owner may also be eligible to sell

or otherwise transfer his "residential allocation." *Id.* § 34.3.[6] Finally, the owner may sell whatever "land coverage" to which the owner is entitled to another eligible landowner. The purchaser of that land coverage would, based on that purchase, have the right to undertake a development project requiring more land coverage than he was initially assigned under the plan. TRPA Code § 20.3.C. The seller of such development rights must record deed restrictions on his land notifying all that such rights no longer pertain to his parcel. *Id.* §§ 20.3.C(7), 34.2.B, 34.3.G, 34.5.

A property owner whose parcel of land is determined to be entirely SEZ property receives an IPES score of zero. TRPA Code § 37.4.A(3). That land is not eligible for residential development. With a few exceptions, SEZ property cannot be used for the construction of permanent structures because of the adverse impact of such development on the water quality of Lake Tahoe. *Id.* § 20.4.B.

Just like other private owners of vacant residential lots in the Basin, however, the owner of SEZ property may sell the TDRs that arise out of his ownership of his parcel, including land coverage, residential development right, and residential allocation, to another. TRPA Code §§ 20.3.C, 34.2, 34.3. In addition to the one residential development right to which each private owner of vacant residential property is entitled, the owner of an SEZ property may earn up to three *additional* residential bonus units. The owner

[6] A property owner whose IPES score is below the minimum for that year may nonetheless possess a valuable residential allocation that he may sell. *Id.* §§ 33.2.B, 34.3. Approximately ten percent of new residential allocations (30 out of 300) are reserved each year for distribution to owners of parcels with IPES scores below the minimum that year. *Id.*; see J.A. 145-146. Those who apply and receive the allocation may sell or otherwise transfer that right for use on another eligible parcel during the relevant calendar year.



earns and is assigned those units upon TRPA approval of the sale or transfer of his initial residential development right. *Id.* §§ 35.2.C, 35.2.D(4).[7] The bonus units provide mitigation for the stringent development restrictions applicable to the land itself. Many owners of SEZ property have successfully obtained and sold bonus units. See J.A. 148.

The owner of SEZ property also receives land coverage rights equal to one percent of his land. TRPA Code § 37.11.B(1). The relatively low land coverage percentage reflects the environmentally sensitive character of the land upon which the percentage is based. *Id.* § 37.11.A. Finally, the SEZ owner may apply for a residential allocation in any particular year and, if awarded an allocation, sell it for application to an eligible property in the Basin. *Id.* § 33.2.B.[8]

**2. Proceedings Below**

1. In 1972, petitioner and her husband purchased her lot in the Mill Creek Estates Subdivision located in Incline

[7] Contrary to petitioner's claim (Br. 6), the "bonus units" are neither unlimited or arbitrary. The plan limits the number of bonus units at 1,600. TRPA Code § 35.2.A.

[8] Property owners, including owners of SEZ parcels, with lower than the minimum IPES score required for development first became eligible to compete for residential allocation in 1993. See J.A. 145-146; note 6, *supra*. During that year, 30 parcels out of a total of 400 eligible in Washoe County competed for six allocations. *Id.* at 146-147. Because an owner of SEZ property who does not receive an allocation one year may reapply in succeeding years, the possibility of receiving an allocation over several years approaches 100 percent. See Amicus Br. League to Save Lake Tahoe 21. Allocations for owners of SEZ property, therefore, can hardly be fairly characterized as "scarce" (Pet. Br. 5).

Village, Washoe County, Nevada. J.A. 2. Petitioner first applied to develop her property 17 years later in 1989. Pet. App. A6. A TRPA team of scientists had conducted a field inspection of her property under IPES to determine its suitability for residential development and concluded that it was an SEZ. Pet. App. A6; see TRPA Code § 37.5.[9] The team based its determination on the nature of the vegetation on the property, the evidence of near surface groundwater on the site, and the adjacency of the parcel to Mill Creek, which runs along the border of petitioner's land to Lake Tahoe.[10]

The TRPA, accordingly, assigned the property an IPES score of zero, which petitioner appealed. In response to her appeal, a different TRPA team of scientists examined the physical characteristics of her property. Because they confirmed the conclusions of the first investigators, the TRPA denied petitioner's appeal of the SEZ determination and of her IPES score. Pet. App. A6; see note 10, *supra*.

2. Petitioner subsequently filed in federal district court this regulatory takings claim against the TRPA, alleging that, as applied to her property, the TRPA Ordinances constituted a taking of private property requiring the payment of just

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[9] Petitioner asserts (Br. 2 n.1) that her property "was assigned a rating of six on th[e] seven point system" used to determine land's suitability for development at the time of her purchase. TRPA believes that her land was classified as an SEZ under the seven point system referred to in her complaint. A TRPA Ordinance adopted several months prior to her purchase limited land coverage on SEZ property to one percent coverage except in limited circumstances. In all events, this disputed factual issue would be for the trial court's resolution once petitioner's takings claim is ripe.

[10] C.A. Rec. Item #68, Attachment, pp. 1-2 (Memorandum to Governing Board from Agency Staff of TRPA, re "Request for Hearing of IPES Score: Suitum, APN 130-211-31 (8/5/90)).



compensation under the Fifth Amendment. J.A. 1-6.[11] She based her takings claim on her allegation that the TRPA Ordinances deprived her of all economically viable use of her property. J.A. 3. Prior to the filing of her lawsuit, petitioner did not attempt to sell or to obtain TRPA approval of a transfer of her TDRs, including her land coverage, residential development right, or any bonus residential development units. Pet. App. A6.

3. The district court dismissed the complaint for lack of ripeness. Pet. App. C1-C5. Prior to ruling on the ripeness issue, the district court provided the parties with an opportunity to file a brief specifically addressing the relevance of her TDRs to the ripeness of her claim. Petitioner contended that her takings claim was ripe because TDRs were an "absurd avenue," a "ruse," a "false illusion" that had "produced no sales," and that the TRPA Ordinances lowered her property value to a "negative number." Plaintiff's Response to Defendant TRPA's Memorandum Concerning Transfer of Development Rights, 2 (C.A. Rec. Item #77). The TRPA responded by contending that TDRs possessed substantial market value, based on past market transactions. J.A. 93-95. Both petitioner and the TRPA supported their positions on TDR value with affidavits. *Id.* at 123-143.

The district court concluded that petitioner's takings claim was not ripe for adjudication. The court reasoned that because "transfer rights are significant to the takings calculus," "until values attributable to the transfer program are known, the court cannot realistically assess whether and

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[11] Petitioner also apparently raised substantive due process and equal protection claims (Pet. App. A4, D1) in her complaint. See J.A. 4-5. The petition for a writ of certiorari, however, is confined to the ripeness of her regulatory takings claim.

to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations." Pet. App. C3, C4. The court agreed with the TRPA that "there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to." *Id.* at C3.[12] "The finality, in terms of allowed use of the property, may only be determined after plaintiff applies to transfer her development rights." *Id.* at C3.

4. The court of appeals affirmed. Pet. App. A1-A12. The court concluded that "[w]ithout an application for the transfer of her development rights," a court "cannot know the regulation's full economic impact or the degree of the interference with [petitioner's] reasonable investment-backed expectations." *Id.* at A9. The court rejected petitioner's claim that the TDR program was a mere "ruse" or "sham," and upheld the trial court's finding that there is "significant value in the transfer of residential development rights and transfer of residential allocations." *Id.* at A10. For those same reasons, the court rejected petitioner's contention that any effort she might make to transfer her TDRs and seek TRPA approval of such a transfer would be "futile." *Id.* at A11.[13]

## SUMMARY OF ARGUMENT

1. The lower courts reasonably applied prudential ripeness doctrine in dismissing petitioner's regulatory takings claim. Prudential ripeness turns on consideration of "the

[12] The district court excluded the affidavit supplied by petitioner's "expert" on the ground that it lacked the necessary indicia of reliability and credibility for admission into evidence. Pet. App. C2 n.1

[13] The court of appeals also affirmed the district court's exclusion of the affidavit submitted by petitioner in support of its ripeness claim. Pet. App. A11. Petitioner did not seek review of that fact-bound ruling in her petition.



fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Both factors support the judgment that ripeness is lacking.

a. The "fitness of the issue" for adjudication necessarily depends on the "issue" being raised. The merits of petitioner's as-applied regulatory takings claim turn on the "economic impact" of the regulations that she challenges and, even more specifically, on the assessment of her extreme factual allegation that her TDRs are utterly without economic value. The district court reasonably concluded that a claim based on such extreme factual allegations would be "fit" for adjudication after petitioner had sought to market and transfer her TDRs. Then, the court could decide how robust a market exists for TDRs and their approximate market value, based on petitioner's actual marketing efforts. The court's determination, understood in light of petitioner's specific claim, was entirely reasonable.

b. The "hardship" to petitioner of requiring her to take the minimal steps necessary to assist the district court's determination is not substantial. Petitioner could have satisfied the district court by taking modest steps through reasonably available procedures to ripen her claim and render her extreme factual allegations more susceptible to judicial evaluation. Nothing in the TRPA TDR program remotely supports the chorus of loud complaints of overwhelming hardship and burden directed at it by petitioner and her supporting amici. Indeed, there are both distinct advantages to petitioner of postponing adjudication and disadvantages to the TRPA of doing so.

2. Before this Court, petitioner seeks to attack the lower court's judgment by dramatically recharacterizing her ripeness argument. In the lower courts, petitioner's primary

argument was that her claim was ripe because the TDRs lacked any economic value. Petitioner now adds two additional arguments. Neither, even if timely, possesses merit.

a. Petitioner's first new argument is that whatever positive value her TDRs possess is susceptible now to judicial resolution. Petitioner's new argument raises a narrow, close question. But petitioner offers no persuasive reason to disturb the district court's determination that it could best evaluate the "economic impact" of the restrictions petitioner challenges after petitioner had taken reasonable steps to market her TDRs and seek TRPA approval of their transfer. The further development of the factual record pertaining to the economic impact of the development restrictions would render petitioner's taking claim significantly more "fit" for judicial determination. And the hardship of postponing adjudication until then remains relatively insignificant.

b. Petitioner's second new argument likewise lacks merit, but it is far more extreme in its reach. Petitioner broadly challenges the relevance of the value of TDRs to the constitutionality of TRPA's restrictions on development. According to petitioner, TDR value is irrelevant to the question whether a taking of property has occurred.

Petitioner, in effect, invites this Court to overrule its decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which squarely held to the contrary. In *Penn Central*, the Court held that TDRs are relevant to the question whether a regulatory taking has occurred because they mitigate the economic impact of development restrictions. Amazingly, however, petitioner does not cite *Penn Central* even once in her brief. Yet, while ignoring applicable Court precedent, petitioner recklessly calls into



question the constitutionality of a host of comprehensive land use plans throughout the nation, which, relying on *Penn Central*, utilize TDRs and other analogous property rights innovations to achieve a more equitable sharing of the benefits and burdens of development restrictions.

Nor do any of this Court's decisions, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), support petitioner's extreme view of a property owner's constitutional right to "use" land for developmental purposes, regardless of its retained economic value. This Court has consistently maintained in all of its regulatory takings cases, including *Lucas*, that the "economic impact" of a regulation is the relevant consideration in the takings inquiry. The Court has never intimated that there is a developmental "use" inquiry distinct from whether the property has retained market value. Instead, market value establishes economic use and the courts do not second guess the specific reasons why the market finds such value in the property. Where, moreover, as in this case, the regulatory regime that petitioner attacks includes both property right enhancements as well as restrictions, regulatory takings analysis requires consideration of the net "economic impact" of both the restrictions and the enhancements.

## ARGUMENT

### THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S REGULATORY TAKINGS CLAIM BASED ON THE LACK OF RIPENESS

"[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services*, 509 U.S. 43, 58 n.18 (1993), citing *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (per curiam). The prudential

dimension of ripeness stems from the justiciability doctrine and the judiciary's effort to limit its involvement where judicial review would be premature. See generally *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring); see *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 200 (1983). A central prudential ripeness concern is "the need to 'flesh out' the controversy" (*Catholic Social Services*, 509 U.S at 71 (O'Connor, J., concurring) to "present the constitutional issues in 'clean-cut and concrete form." *Renne v. Geary*, 501 U.S. 312, 321 (1991), quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947).

The lower courts in this case concluded that prudential ripeness concerns warranted dismissal of petitioner's as-applied regulatory takings claim. Petitioner challenges that judgment on three different grounds, only one of which served as the basis for her ripeness arguments in the lower courts. Because the lower courts reasonably applied prudential ripeness doctrine, this Court should reject all of petitioner's arguments, both old and new. The court of appeals' judgment, accordingly, should be affirmed.

### A. Prudential Ripeness Concerns Support Delaying Adjudication of Petitioner's Regulatory Takings Claim Until She Has Taken Reasonably Available Steps To Develop The Factual Record Necessary To Evaluate The Merits Of Her Claim In A More Concrete Setting

Prudential ripeness "is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v.*



*Gardner*, 387 U.S. 136, 149 (1967). In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), this Court concluded, consistent with *Abbott Laboratories*, that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Applied to the case at hand, both *Abbott Laboratories* factors similarly support the lower courts' determinations that petitioner's regulatory takings claim lacks prudential ripeness.

1. The merits of petitioner's as-applied regulatory takings claim turn on extreme factual allegations regarding the regulation's economic impact. The validity of these allegations would be significantly more "fit" for judicial decision after petitioner has made a meaningful effort to determine the regulation's actual impact on the market value of her property, including her TDRs, pursuant to TRPA procedures.

a. The ripeness of a regulatory takings challenge often turns on whether the challenge is facial or as-applied. The "critical" distinction between facial and applied takings claims is that the former asserts that the "mere enactment of a statute constitutes a taking" and the latter asserts "that the particular impact of a government action on a specific piece of property" constitutes a taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Because facial takings claims are, by their nature, less fact-dependent, the "predominately legal" issue they raise is more likely to be "fit" for judicial decision in the absence of further factual development. Cf. *Pacific Gas & Electric v. State Energy Resources Comm'n*, 461 U.S. at 201. But, for that same reason, a facial takings challenge, while ripe, is far less

likely to succeed on the merits -- the plaintiff is hardpressed to demonstrate the degree of economic impact necessary to establish that enactment of the regulation "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); see, *e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 493; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Here, however, petitioner has brought an "as-applied" regulatory takings claim,[14] in which resolution of the merits of the claim "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992); see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413 ("the question depends upon the particular facts"). In as-applied takings cases, the "very nature of the inquiry required by the Just Compensation Clause" -- *i.e.*, the "'essentially ad hoc, factual inquir[y],' involved in takings analysis" -- renders the takings claim less fit for judicial resolution in the absence of a fully developed "factual setting." See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 190; *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-295 (1981).

One of the factual inquiries of "particular significance" is "the economic impact of the particular regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 124. This "'ad hoc factual inquir[y]' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the

[14] See, *e.g.*, Pet. Br. 4; Appellant Suitum Ct. App. Br. 2.



ique circumstances." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

b. In this case, of course, we do know how far the regulation has "gone" in one respect. We know the full extent of the regulation's impact in restricting petitioner's development of her own land. The TRPA has finally determined that petitioner's land lies entirely within an SEZ; therefore, she cannot build a permanent residential structure on her parcel.

Petitioner is nonetheless mistaken in assuming that finality on that issue necessarily renders her takings claim ripe. In particular, petitioner misreads (Br. 13-15) the import of this Court's ruling in *MacDonald* that "an essential prerequisite" to maintaining an as-applied regulatory takings claim "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald*, 477 U.S. at 348. But the Court in *MacDonald* stated only that such a "determination" was "an essential prerequisite" for ripeness. The Court never intimated that it was the *exclusive* prerequisite for ripeness.

To be sure, in many instances, it may well be, because that is the only relevant determination of economic use to be made. But not so here, where there are determinations yet to be made regarding petitioner's utilization of aspects of her property other than her right to develop her own land. Indeed, *Abbott Laboratories* treated the finality of an agency's ruling as only one factor in its ripeness determination. 387 U.S. at 149. The Court also found significant that the petitioner was subject to immediate,

serious sanctions for disobedience and that the case presented only a "purely legal" issue for decision. *Id.* at 149, 153-54.

Here, the property right to build on the land itself is not the only property right arising out of her ownership of that land. The TRPA Ordinances grant her a further property right based on her land ownership that allows her to sever development rights from her land for sale and transfer to other parcels. Determination of the value of those severable property rights, a question of fact, therefore, becomes necessary to determine the "economic impact" on petitioner of the application of TRPA's Ordinances to her property. Where, as in this case, the challenged regulatory program includes both property rights restrictions and enhancements, a court's evaluation of the program's "economic impact" necessarily requires consideration of how both affect the market value of the owner's property.

Nor is it an open issue whether TDRs are relevant to the "economic impact" inquiry and to the question how far a regulation has "gone." In *Penn Central*, this Court squarely addressed that very issue. The Court held that "the [TDR] rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Central*, 438 U.S. at 137.

c. The district court in this case, therefore, acted, entirely reasonably, as did the court of appeals, in ruling that prudential ripeness concerns support delaying a judicial decision until the court had a more developed factual record of the value of petitioner's TDR property rights. The ripeness ruling was largely justified by the extreme nature of the factual allegation upon which petitioner based her takings claim.



What factual development and regulatory steps are required for ripeness turn not just on whether a regulatory takings claim is facial or, as here, as-applied, but also on the nature of the factual allegations upon which that as-applied takings claim is based. Here, petitioner argued in the lower courts that her takings claim was ripe because the entire TDR program was "a ruse, a sham," "a false illusion," and "an idle futile undertaking" that "has produced no sales." See Appellant's Ct. App. Br. 20, Appellant's Ct. App. Rep. Br. 4. She argued that her property "has no economic value" and the TRPA has "reduced the value of her property not to zero, but to a negative number." Appellant's Ct. App. Br. 20; Appellants Ct. App. Rep. Br. 2. Indeed, these extreme and unsubstantiated factual allegations were essentially the exclusive basis upon which petitioner argued that her claim was ripe in the lower courts.

In finding petitioner's taking claim unripe, the lower courts effectively held that those extreme factual allegations were unhelpful for rendering her takings claim "fit" for judicial resolution. The courts understandably rejected her primary allegation, and then cautiously concluded that the takings claim could best be adjudicated after petitioner had pursued steps reasonably available to try to market and transfer her TDRs. Petitioner's unilateral charges of "negative" value did not provide a reliable basis upon which to dispose of the case. The court reasoned that "until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations." Pet. App. C4.

d. The district court, moreover, provided petitioner with a threshold opportunity to support her extreme factual claim and the TRPA with an opportunity for refutation. The result is telling. Petitioner proffered a supporting affidavit that the

district court excluded from evidence because of the absence of the necessary minimum indicia of credibility. (The court of appeals affirmed that exclusion, which petitioner does not challenge before this Court).[15] There was consequently no admitted evidence supporting petitioner's extraordinary charges.

There was, by contrast, substantial admitted evidence that petitioner's factual claims lacked validity. The trial court admitted into evidence an affidavit of an expert submitted by the TRPA. That expert's affidavit described numerous sales of TDRs in the Tahoe Basin at significant prices. See J.A. 123-132, 139-143. Relying on the TRPA expert, the district court concluded that "there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to." Pet. App. C3.

Because petitioner has not challenged the correctness of the lower courts' factual findings or their exclusion of petitioner's "expert" evidence, this Court must likewise reject any claim of ripeness petitioner makes based on an allegation

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[15] The district court pointedly excluded from consideration the only evidence that petitioner had presented - an affidavit filed by petitioner's "expert" -- in support of her otherwise conclusory allegations regarding the TDR program and the impact of the application of the TRPA Code to her property. The court concluded that "affidavit * * * is inadequate under FRCP 56(e)" because "[t]here is no showing that Mr. Kaleta is an expert" with the "knowledge, skill, experience, training or education which would qualify him to testify * * * as to the valuation of the development rights with which this Court is concerned." Pet. App. C1 n.1. The court of appeals affirmed the exclusion of petitioner's only evidence in support of her allegations regarding the TDR's lack of any value and the sheer futility of utilizing the TRPA TDR procedures. See *Id.* at A11 ("Given that Suitum's development rights possess some significant value, Suitum fails to meet her burden of showing that participation in the TDR program is futile."). See notes 12 & 13, *supra*.



that her TDRs lack all economic value. It is simply too late in the day for petitioner to insist on a factual premise that, when provided with a meaningful opportunity, she failed to support in the lower courts. Cf. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978).

2. The second *Abbott Laboratories* factor -- "the hardship to the parties of withholding court consideration" -- is equally supportive of the lower courts' rulings on ripeness. 387 U.S. at 148-149. The district court is requiring petitioner to take only the minimal steps necessary to make a good faith effort to find an interested purchaser of her TDRs and to seek the TRPA's approval of the transfer.

a. Petitioner and her supporting amici launch a series of hyperbolic rhetorical attacks on the extraordinary burden this would place on petitioner.[16] Stripped of their exaggerated rhetoric, however, nothing remains. Neither petitioner nor any of her amici can offer any support for their claim of undue burden.

TRPA procedures for seeking out a purchaser and transfer approval are not burdensome. "[N]o irremediable adverse consequences flow from requiring a later challenge."

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[16] See, *e.g.*, Pet. Br. 11, 12 ("no limit to the number of irrelevant and unavailing procedures" and "an infinite array of trivial and time consuming administrative procedures"); Amicus Br. Institute for Justice 5, 7 ("require multiple forms and complicated negotiations" and "endless procedural hurdles"); Amicus Br. American Farm Bureau Federation, et al., 8, 23 ("insurmountable and interminable," "intricate and unwieldy TDR scheme," and ("incredibly burdensome procedural rules"); Amicus Br. Tahoe-Sierra Preservation Council, Inc., 5 ("labyrinthian new TDR maze"); Amicus Br. of The Mayhews, et al., 8 ("Sisyphean endurance course of multiple applications for development permission and of useless and futile acts").

Cf. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967). Nor is this a circumstance where "delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 82 (1978). Just compensation is the remedy for governmental takings. That remedy will be equally available in the future.

Petitioner also wrongly assumes (Br. 10, 27) that TRPA maintains that a ripe regulatory takings claim requires a consummated sale and a relinquishment of all property rights. There is no requirement that petitioner in fact sell her TDRs. If she did sell her TDRs, then her claim would most certainly be ripe. But, her regulatory takings claim *does not require* a consummated sale to be ripe.

Petitioner's contrary view derives from her erroneous equation of TRPA approval with a final sale. TRPA's approval of a specific transfer to eligible property makes a subsequent sale possible. It remains, however, for the property owner then to decide whether to complete the sale. Because a TRPA approval is effective for as long as three years (TRPA Code § 4.9), the property owner has substantial time to make a decision.[17]

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[17] For these same reasons, petitioner is mistaken in claiming (Br. 32) that she must formally record a permanent restriction on all development on her parcel to make her takings claim ripe. The approval is instead made conditional on that subsequent event, which for transfer of residential development rights may occur anytime within three years of the conditional approval. See J.A. 99. For transfer of a residential allocation from an SEZ property, however, the transferor has only until the close of the calendar year to satisfy the condition. See TRPA Code § 33.2.B. The recordation requirement protects subsequent parties considering purchasing land or TDRs by notifying them which rights have been severed and conveyed, and is no different in principle from recording requirements for easements and servitudes.



Nor, does the TRPA claim that a regulatory takings claim would never be ripe until such TRPA approval was sought and obtained. TRPA has readily acknowledged that petitioner's takings claim could be ripe short of such approval. Consistent with ripeness' concern about "hardship to the parties," TRPA readily acknowledged in the lower courts that petitioner need only make a "good faith" effort to sell or otherwise transfer her TDR rights and obtain TRPA approval of a transfer. See Ninth Circuit Oral Argument Tr. 15-16, *Suitum v. TRPA*, No. 94-15768 (argued Nov. 13, 1995).[18] In the context of TDRs, there is no rigid ripeness

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[18] THE COURT: How long does she have to wait to determine whether she will try to go through that process, will it go on forever?

MR. SUSICH: No. We think that Mrs. Suitum certainly has to make a good faith effort to transfer those rights.

See Ninth Circuit Oral Argument Tr. 15-16, *Suitum v. TRPA*, No. 94-15768 (argued Nov. 13, 1995). The Ninth Circuit makes available audio recordings of its oral arguments. In this case, petitioner arranged for a formal transcription of the recording, which she relied upon in seeking rehearing before the court of appeals. A copy of the transcript has been lodged with this Court.

Of course, although a property owner's good faith effort to sell her TDRs could establish ripeness, neither the particular offers she obtained nor the absence of an offer, if that occurred, would conclusively establish the relevant market value for regulatory takings purposes once the case was ripe for adjudication. A specific bona fide offer or offers to purchase, or the absence of any offers, would be significant evidence for the judicial factfinder's consideration. But the factfinder would not be confined to such evidence in determining the "economic impact" of the challenged regulation. A contrary, inflexible evidentiary rule would not serve the interests of either the property owner or governmental agency, or of the court.

requirement of final TRPA approval, let alone a requirement of a final, consummated sale.[19]

Although the lower courts, in response to petitioner's extreme and unsubstantiated factual allegations, stated that her claim would not be ripe until she had obtained TRPA approval, we do not read those courts as having held that TRPA approval would be required in all cases for prudential ripeness. The courts had no occasion to address which lesser steps by a landowner would ripen a claim, because they were faced only with petitioner's categorical allegations and complete inaction. And, while we do not believe that a rigid ripeness requirement is needed in the TDR context, there are certainly advantages to litigants and to the courts from the lower courts' clear rule of finality, which makes plain one way to ensure ripeness.

b. Indeed, there are distinct *advantages* to petitioner in attempting to obtain approval of a specific transfer of her

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[19] Contrary to petitioner's intimation (Br. 27-28), her regulatory takings claim would most certainly not have been rendered moot by her mere application to transfer her TDRs. The application and its approval do not, by themselves, eliminate any of her property interests (see page 26, *supra*). Indeed, her claim would not be moot even after she sold her TDRs and recorded a permanent restriction on development. Any economic injury would remain, as would a court's ability to provide any relief mandated by the Just Compensation Clause. The TRPA's ability to minimize the monetary remedy could, of course, have changed. In some circumstances, the TRPA would retain the option of lifting the development restriction and pay just compensation for any temporary taking, but in some cases that might not be an option. Even so, that imposes no hardship on petitioner. Any hardship is on the TRPA, which has sole authority to make the remedy selection determination under this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). In all events, petitioner has no complaint and mootness is not at issue. There is no "Catch-22" here. Pet. Br. 28.



TDRs before a decision on the merits of her takings claim. Property owners sometimes have complained that the problem with innovative property rights like TDRs is that their market value may be uncertain until the market becomes fully developed and settled. See Amicus Br. Institute of Justice 6, 18 ("difficult to value" and "value that inheres in them is rendered highly uncertain by the nature of the right"). By making a meaningful good faith effort to obtain TDRs, receive an offer for their sale, and seek the TRPA's approval of the transfer, petitioner can have the merits of her takings claim judicially resolved based on actual offers to purchase. Petitioner would not have to enter into speculation regarding only hypothetical offers based on sales of other property.[20]

For that same reason, there are distinct disadvantages to the TRPA from the lower courts' ripeness rulings. Based on the existing record, the more weighty evidence -- indeed only admitted evidence -- before the trial court demonstrated that petitioner's TDRs possessed substantial economic value. Had, therefore, the merits been litigated based on the evidence then before the Court, petitioner's takings claim undoubtedly would have failed. The TRPA nonetheless agreed with the courts below that, on balance, prudential concerns tipped the scale against review of petitioner's as-applied takings claim in light of the undeveloped factual record before the court.

Finally, petitioner's claim of hardship is unpersuasive because she failed even to undertake a minimal effort to obtain and sell or otherwise transfer her TDRs. Absent that

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[20] Unlike petitioner, her own supporting amici apprehend the resulting advantage to her. See Amicus Br. The Mayhews, et al. 5 ("It may be that Mrs. Suitum is ill-advised to proceed in the face of the unresolved factual matter of the potential value of TDRs.").

effort, any claims she might make that the applicable procedures are unduly burdensome has a "particularly hollow ring." Cf. *Penn Central*, 438 U.S. at 132. Had petitioner chosen simply to follow the district court's guidance rather than pursue this lengthy appeal, her takings claim would have become ripe several years ago.

### B. Likewise Lacking In Merit Is Petitioner's New Argument That Her Regulatory Takings Claim Is Ripe Because, According to Petitioner, Any Positive Market Value Possessed By Her TDRs Can Now Be Judicially Determined

Petitioner, understandably, seeks to distance herself from the extreme factual allegations that prompted the lower courts to reject her complaint on prudential ripeness grounds. She now posits a factual allegation directly contradicted by her factual allegations in the lower courts: whatever positive value her TDRs possess is susceptible to judicial resolution now through "ordinary appraisal methods" (Pet. Br. 25).

Of course, because petitioner never made such an argument before the district court, the lower courts never had an opportunity to consider this ripeness issue and the merits of the new factual allegation upon which it is based. Because "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower courts," the Court should reject petitioner's argument for this reason alone. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). But, in all events, petitioner's new ripeness claim, like her previous one, lacks merit because the value of further factual development is considerable and the hardship to the parties remains minimal. See pages 22-23, 25-28, *supra*.



To be sure, in most contexts, no further steps would be necessary to develop the necessary factual record where, as has occurred in this case, the governmental agency has reached a final decision regarding the extent of development permitted on a particular piece of land. Expert appraisal testimony would, standing alone, be sufficient to determine market value. TDRs in the Tahoe Basin are, however, a sufficiently new property right that it is prudent for a reviewing court to seek to determine their market value based on more reliable evidence of their market value.

The advantages for the reviewing court are considerable where, as here, a market is emerging in a newly-created property right. The court can minimize judicial speculation and avoid substituting its judgment for that of the market place. The factfinding tribunal can rely on some of the best evidence available of actual market value -- the market itself.

The TRPA, moreover, provides a procedure for individuals like petitioner to obtain their full panoply of TDR property rights -- land coverage, residential development right, bonus residential development rights, and residential building allocation -- and to have their transfer approved. A property owner who follows the available TRPA procedures provides a reviewing court with a concrete factual record upon which the court can determine the economic impact of the TRPA's program and thus the merits of a regulatory takings claim. Absent, significant hardship -- and conclusory allegations aside, petitioner has shown none -- a trial court is well within the province of reasonableness in deciding to decide a regulatory takings claim based on a more complete factual record.

### C. This Court Should Reject Petitioner's New Contention That Her Takings Claim Is Ripe Because, According to Petitioner, Her TDRS Are Not Relevant To Judicial Consideration Of The Merits Of Her Takings Claim Regardless of Their Economic Value

Finally, petitioner argues (Br. 18-23, 30-34) that her takings claim is ripe because the value of her TDRs are wholly irrelevant to the merits of her claim. According to petitioner, the taking issue turns exclusively on the developmental uses to which she can herself put her lot. Neither the economic value of her parcel, as restricted, nor of her TDRs plays any role in the constitutional equation. No matter what their value, her property has been "taken." According to petitioner, therefore, a court need not postpone resolution of the merits of petitioner's takings claim until the value of her TDRs are more "fit" for judicial resolution. Petitioner's final argument is even less persuasive than her prior contentions.

#### 1. This Court's Settled Precedent Establishes That TDRs Are Relevant To Whether Property Has Been "Taken"

a. Somewhat astonishingly, petitioner neglects to discuss or even once to cite to a landmark decision by this Court that squarely contradicts her argument. In *Penn Central Transp. Co. v. City of New York*, this Court considered the relevance of TDRs in a regulatory takings claim. In particular, the Court considered whether the availability of TDRs was relevant to any one of the three factors the Court identified as "of particular significance" in resolving a regulatory takings claim: (1) the "character of the governmental action"; (2) the extent of any "interfere[nce]



with distinct, investment backed expectations"; and (3) the "economic impact" of the regulation. 438 U.S. at 124. The Court concluded that "the [TDR] rights * * * undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Central*, 438 U.S. at 137.

Hence, it is settled precedent that TDRs are relevant to the question whether a "taking" has occurred in the first instance. The value of TDRs is not relevant only to the secondary issue whether "just compensation" has been provided for "taken" property. Petitioner's total silence regarding *Penn Central* in her brief, extending to its very existence, speaks volumes about the extreme character of her final assertion of ripeness.

b. *Penn Central* is not, moreover, the only relevant decision of this Court inconsistent with petitioner's view that the "economic impact" inquiry is concerned only with the economic viability of developmental uses to which she may herself devote her own land. Her view would call into question a settled line of regulatory takings precedent both predating and subsequent to *Penn Central*. This precedent consistently focuses on the "economic impact" of the regulation,[21] particularly on any resulting diminution in the

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[21] See, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. at 174 ("economic impact"); *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (same); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-225 (1986) (same); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 495 (same); *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (same).

market value of the regulated property.[22] As the Court unanimously held in *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993), "'our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property'" (quoting *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497).

Petitioner's contrary view rests on a fundamental misapprehension of this Court's invocation of the term "use" in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and in other regulatory taking cases. To be sure, those decisions discuss "use." But, in none of those cases, including *Lucas*, was this Court purporting to address the distinct legal issue petitioner attempts to raise for the first time in this case, which is whether a property owner has an inherent right to develop her land, regardless of its retained economic value. See Pet. Br. 9, 23.

Indeed, the clear assumption of the Court in all of its decisions is that no such distinction can be validly drawn. The Court never treats economic "value" as distinct from any particular "use." Instead, the Court treats the presence (or absence) of economic value as conclusively demonstrating that "economically viable use" remains (or has been eliminated). If there is a market value, then there is a "use" for takings purpose. Otherwise, presumably there would be no one willing to pay that price for the property. Courts do not undertake an independent inquiry into why the purchaser is willing to pay that amount. Why a purchaser finds market value is wholly irrelevant, as is the particular kind of use,

[22] See, *e.g.*, *Pennsylvania Coal v. Mahon*, 260 U.S. at 413 ("extent of the diminution"); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("a comparison of values before and after is relevant"); *Agins v. City of Tiburon*, 447 U.S. at 262.



developmental or otherwise, upon which the purchaser bases her willingness to pay.[23]

Not surprisingly, therefore, this Court's ruling in *Lucas* itself provides no support for petitioner's strained reading of that case. Although the Court referred to the deprivation of all "economically viable use," the Court simultaneously made plain that "use" turned on market value. The *Lucas* Court repeatedly referred to "value" and made clear that the total "diminution in (or elimination of) value" was the touchstone for its newly-formed *per se* takings test.[24] The Court

[23] For this reason, there is accordingly absolutely no merit to petitioner's assumption that there is no relevant "use" of property for purposes of takings analysis where the current landowner's best option is to sell the property to someone else, even if that person is willing to pay significant value for the property. Indeed, such potential "residual value" and its significant nature is not a matter of speculation either in Lake Tahoe or, as it happens, in this case. In this case, the district court specifically found that petitioner's land may retain "significant residual value" wholly apart from the value of her TDRs. Pet. App. C3. That judicial finding rested on respondent's expert testimony, based on past sales, of the significant market value of petitioner's property to neighboring owners desiring to expand their own lots around their homes. J.A. 123-132, 139-143. Nor is that finding surprising in the Tahoe Basin where the value to homeowners of a much larger lot size for recreational and aesthetic use would be considerable. See J.A. 149. The fundamental "right to exclude" is a valuable property right. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 2316 (1994); *Kaiser Aetna v. United States*, 444 U.S. at 176. The court of appeals did not disturb that factual finding, the validity of which was likewise not questioned by the petition for a writ of certiorari. This case, accordingly, bears no relation in this respect to *Lucas v. South Carolina Coastal Council*, where the Court was faced with uncontroverted factual allegations that the restricted private land retained no residual economic value. See 505 U.S at 1022 n.9.

[24] See, *e.g.*, 505 U.S. at 1007 ("effect on the economic value"); *id.* at 1016 n.7 ("loss of value" and "diminution in (or elimination of) value"); *id.* at 1017 ("'[F]or what is the land but the profits thereof[?]'")

nowhere intimated that the property owner had a constitutional right to "the full exercise of the development rights inherent in the ownership of their property" (Pet. Br. 23).

In his separate concurring opinion, Justice Kennedy made even more explicit the equation between the "economically viable use" inquiry and the "economic impact" inquiry. He stated that the trial court finding of no economically viable use "appears to presume that the property has no significant market value or resale potential." 505 U.S. at 1033-34. Here too, the touchstone of the judicial inquiry is "market value," including "resale potential," which is completely inconsistent with petitioner's novel notion that the current owner of real property must be allowed to secure economic return by herself developing her land.[25]

c. Accordingly, in this case, petitioner's exercise of her TDRs is a "use" of her property for regulatory takings purposes. Petitioner is being allowed to "use" her property by severing her various rights to develop from her initial parcel and by selling or otherwise transferring them for application to a different parcel. See *MacDonald, Sommer*

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(quoting 1 E. Coke, Institutes, ch. 1 §1 (1st Am. ed. 1812); *id.* at 1019 n.8 ("a complete elimination of value").

[25] In all events, petitioner's reliance on *Lucas* is misplaced as is her assumption (Pet. Br. 1) that her property lacks all economic value. As described in note 23, *supra*, and note 34, *infra*, the significant residual value her parcel currently retains, wholly apart from her valuable TDRs, takes petitioner outside the *Lucas* framework, which is triggered only by "a complete elimination of value." 505 U.S. at 1019 n.8 Petitioner's takings claim, therefore, would be subject to the takings framework this Court established in *Penn Central*, which includes "economic impact" as one of the distinct factual inquiries of "particular significance." *Id.*



*& Frates v. Yolo County*, 477 U.S. at 350; *Penn Central*, 438 U.S. at 137.

Petitioner is flatly wrong in suggesting that these TDRs are not property rights. If, as petitioner argues (Br. 19), that is the "most fundamental reason" for why petitioner's claim is ripe, then it is also a "fundamental reason" why petitioner is mistaken. A TDR arises out of an individual's ownership of land.[26] Under a state law, a TDR can be a property right with substantial economic value that can be bought and sold, taxed as property,[27] and, if condemned by the government, would require the payment of just compensation.[28]

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[26] Unlike petitioner, at least one of her amici recognizes that a state can permissibly make a TDR part "of her fee simple ownership." Amicus Br. Institute for Justice 2.

[27] See, *e.g.*, *Mitsui Fudosan (U.S.A.), Inc. v. County of Los Angeles*, 219 Cal.App.3d 525, 528, 268 Cal.Rptr. 356, 357-58 (1990) ("TDRs * * * are appropriately viewed as one of the fractional interests in the complex bundle of rights arising from the ownership of land[] * * * [and] are properly subject to taxation."); cf *Lorenc v. Bernards Township*, 5 N.J. Tax 39, 51 (1982) (rejecting real property tax valuation because "of taxpayer-expert's failure to give any consideration to the subject property's transfer development rights, he has not valued the total fee interest of the subject property").

[28] Petitioner asserts (Br. 9, 19) that a TDR is a mere "variance" for the purchaser rather than a property right sold by the seller. That a property right serves to lift a restriction that applies in the absence of that right does not render that right a mere variance rather than a property right. Indeed, the flaw in petitioner's reasoning is revealed by her own analogy (Br. 26-27) between TDRS and liquor licenses, which, when transferable, have long been treated as "property" in a variety of legal contexts, including bankruptcy. See *In re Farmers Markets, Inc.*, 792 F.2d 1400 (9th Cir. 1986); see also *Chicago Bd. of Trade v. Johnson*, 264 U.S. 1 (1924) (seat on exchange).

d. What the challenged Tahoe ordinances accomplish is a replacement of one property rights regime in a fragile ecosystem with another more suitable regime. The ordinances petitioner attacks, including the TDR program, establish a generally applicable system. They combine restrictions on future and existing development with property right enhancements that allow a landowner to sever his right to develop his property for application to another eligible parcel of land. The nature of the restrictions and enhancements that apply to a specific parcel of land turns on individual scientific assessment -- reflected in the IPES score (TRPA Chap. 37) -- of the relationship of the subject land to the maintenance of Lake Tahoe's fragile ecosystem.

The TDR program also *applies to all landowners in the Tahoe Basin*. It does not apply merely to those owners of SEZ property who are not permitted to build permanent structures on their own land. With limited exceptions, any landowner may sever his development rights from his property and sell or otherwise transfer them for application to another parcel of eligible property. See TRPA Code §§ 20.3.C, 34.2, 34.3. Landowners whose undeveloped land has a high IPES score may do so. So too may landowners with existing uses. By demolishing existing development, they may obtain another form of TDRs, including land coverage and units of use, which can then be sold and applied to other properties. TRPA Code § 20.3.C, 34.4. Indeed, the TRPA program is designed to provide those who own property with existing development with a substantial economic incentive to do just that. TRPA Code § 35.2.D(5).

For this same reason, there is absolutely no merit to petitioner's accusation (Pet. Br. 30), repeated by supporting amici (Amicus Br. American Farm Bureau Federation et al., 8), that TRPA enacted its TDR program as a "tactical ploy" to evade or otherwise render this Court's decision in *Lucas*



a "nullity." The TDR program existed before this Court's *Lucas* ruling as did longstanding, successful programs in many jurisdictions, including New York City, New Jersey, and Montgomery County. See Rick Pruetz, Putting Transfer of Development Rights to Work in California, 31 (Solano Press 1993); Amicus Br. National Trust for Historic Preservation; Amicus Br. Columbia River Gorge Comm'n, 12-15; Amicus Br. National League of Cities, et al.; Amicus Br. State of New Jersey.

e. In all events, it seems somewhat odd for petitioner to complain that government "subverts" *Lucas* when it seeks to diminish a regulatory restriction's adverse economic impact. *Lucas* was concerned with the rare, extreme case where a regulatory restriction deprives an owner of real property of all economically viable use. A regulatory program that creates rights that preserve economic value is not a subversion. It is an improvement upon the extreme facts of *Lucas*.

Nor, of course, does government avoid the Just Compensation Clause by not eliminating all economic value. A regulation that deprives a property owner of less than all economic value may still amount to a taking requiring just compensation. A court presented with such a case simply applies the analytical framework described in *Penn Central*, which includes consideration of the regulation's "economic impact." See *Lucas*, 505 U.S. at 1019 n.8.

Where, moreover, as in this case, the regulatory regime that petitioner attacks includes both property rights enhancements as well as restrictions, regulatory takings analysis requires consideration of the net "economic impact" of *both* the restrictions on "use" and the enhancements on "use." "[A] claimant's parcel of property [can] not first be divided into what was taken and what was left for the

purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe*, 508 U.S. 602, 644 (1993).[29] Just as the whole property affected by a regulation must be considered, so too must the whole bundle of rights held by the owner under the regulation be acknowledged. Certainly, the Fifth Amendment's bottom-line concern with ensuring "justice and fairness" does not support petitioner's claim that takings analysis should consider only the negative and none of the positive economic impacts. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (94) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

2. TDRs Are A Property Rights Enhancement That Furthers The Fifth Amendment's "Justice and Fairness" Concerns

Petitioner's mantra-like characterization of TDRs as "arbitrary" "administrative contrivances" (*e.g.*, Br. 19, 20) is completely misguided. TDRs do not subvert the Fifth Amendment. They promote the Fifth Amendment's justice and fairness goals by creating new private property rights that accomplish a more equitable sharing of the economic burdens and benefits that flow from protecting fragile natural resources upon which existing private property rights depend. See Amicus Br. Economist James Nicholas, et al.

a. Democratic majorities properly demand that government impose development restrictions necessary to

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[29] "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. *Penn Central Transportation Co.*, 438 U.S. at 130-131. This Court focuses rather on * * * the nature of the interference with rights in the parcel as a whole." *Id.*; see *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety").



achieve essential environmental protection goals. At the same time, TDRs reduce the windfalls and wipeouts that otherwise occur when all the burdens of developmental restrictions are absorbed by some landowners and all the benefits are enjoyed by others. They allow those whose property is restricted because of the property's physical characteristics to share nonetheless in some of the economic value preserved and generated by the environmental restrictions. TDRs also spur those whose property is least restricted to buy property rights from those whose property is most restricted. The net result is an emerging use of property rights and free exchange to promote more environmentally sensitive land use.

TDRs therefore reflect a revitalization and expansion of property rights. They do not suggest private property's erosion. TDRs create new property rights and protect and enhance the economic value of existing property rights by guarding against the destruction of common natural resources upon which existing private property rights depend. That is why state and local governments across the country have relied on this Court's ruling in *Penn Central* in using TDRs in their regulatory programs that restrict developmental activities that adversely affect the quality of natural resource commons upon which many property and community interests depend.

b. The role of TDRs in controlling development in Lake Tahoe reflects all of these advantages. The need for development restrictions derives from the unusual value and fragility of the Lake's ecosystem and the interdependence of land uses within the Basin. That is also why the most substantial restrictions on development apply to SEZ parcels of land. Uses of fragile properties can, as they do in Lake Tahoe, require heightened restriction. See *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("Coastal property may

present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."); Richard Posner, Economic Analysis of Law, 60 (4th ed. 1992) (justifying heightened police power regulation of "interactive land uses").

The TRPA TDRs are in no sense "arbitrary" (Pet. Br. 21). Like the generally applicable development restrictions, each of the three TDRs directly relates to the Lake Tahoe Basin's distinct physical features and the need to coordinate the Basin's residential development. The number of "residential development rights" places a cap on long term residential development. The limited number of "residential building allocations" available each year dictates the pace of development. And the "land coverage" percentages govern the amount of impervious coverage resulting from future development in the Basin. See pp. 8-10, *supra*.

The TRPA TDRs also allow for a more equitable sharing of the burdens and benefits of development restrictions, including the restrictions on SEZ parcels. Owners of undeveloped SEZ parcels such as that owned by petitioner are the object of the greatest restriction, but they are not the only objects of restrictions. Property owners with lower IPES scores cannot develop their property until the minimum IPES score for residential development is lowered over time. See TRPA Code § 37.8.C. Existing development is likewise not immune from restriction. Expansion opportunities are limited and all landowners are subject to best management practice regulations that, for the protection of their shared ecosystem, restrict ongoing activities on their properties. See *id.* §§ 25.0-25.8.

But, even more importantly, by imposing restrictions on other parcels as well, the TRPA Ordinances confer



significant market value on petitioner's property, including her TDR property rights. See Amicus Br. League to Save Lake Tahoe 20-21. The TRPA TDR program, therefore, enhances the very "reciprocity of advantage" that this Court has long held relevant to mitigating the adverse distributional effects of land use restrictions.[30]

Petitioner herself enjoys that reciprocity of advantage. Both the significant value of her TDRs and the significant residual value of her land derive from the very restrictions that she challenges. Her TDRs are valuable because other property owners need to purchase them from her if they wish to develop their property more intensely. The restrictions, in effect, create a market for the TDRs. In addition, the value of all property in the Basin, including petitioner's land and TDRs, depends upon the high environmental quality of Lake Tahoe safeguarded by these development restrictions. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 139-140 (Rehnquist, J., dissenting) ("decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties").

c. Nor can petitioner fairly complain (Br. 2, 32) that the TRPA Ordinances unfairly single her out for harsh treatment because other parties have been allowed to build homes on their properties. All undeveloped SEZ residential property is treated alike under the TRPA ordinance.

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[30] See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415 ("secured an average reciprocity of advantage that has been recognized as a justification of various laws"); *Agins v. City of Tiburon*, 447 U.S. at 262 ("Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.").

Petitioner is treated just like other owners of SEZ property.[31]

Petitioner's reliance on the fact that her neighboring properties have homes on them is likewise misplaced. Even assuming that some of those properties would be considered SEZ property, all of that residential development occurred before the current developmental restrictions were enacted. It is no offense under the Takings Clause that government would take a less restrictive approach to existing uses as compared to future or "contemplated uses." Cf. *Penn Central*, 438 U.S. at 125. Quite the opposite is true. That is precisely the distinction that the Takings Clause would support because the interference with existing uses would invariably present a more substantial interference with "reasonable investment-backed expectations." *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992) (quoting *Heckler v. Mathews*, 465 U.S. 728, 746 (1984)) ("'The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification * * *'"). For these reasons, state zoning law has acknowledged a limited exception for existing, nonconforming structures and uses. See, *e.g.*, *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 274 P.2d 34 (1954).

d. Nor can petitioner find fault in the fact that not all undeveloped properties in the Tahoe Basin are similarly circumscribed in their development potential. To be sure, "[w]hen a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry * * * will include consideration of the treatment of similar

[31] Approximately 9,200 acres of SEZ land is privately-held, or about 18% of all private land in the Basin. Just under 50% of that total (4400 acres) had been disturbed, developed, or subdivided by the mid-1980s. See III TRPA 208 Plan, *supra*, at 20.



parcels." *Penn Central*, 438 U.S. at 133 n.29; see *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1035-36 (Kennedy, J. concurring). But equal treatment of "similar parcels" is most certainly not a requirement that all parcels be treated equally regardless of their differences.

Under the TRPA Code, all parcels are subject to some developmental restrictions, and differences in degree are neither arbitrary nor discriminatory. The differences are reasonably based on differences in the physical characteristics of the individual parcels and, in particular, on the extent to which their development would affect adversely the water quality upon which they all ultimately depend. The TRPA Code both wisely accounts for these physical differences while seeking to reduce the disparity in positive and negative economic impacts through the TDR program.

Most simply put, the development restrictions on petitioner's parcel are substantial because the adverse impacts on Lake Tahoe of the physical spillovers caused by such development on SEZ land are substantial. Petitioner does not and cannot challenge in this Court the relevant "environmental thresholds" or the designation of her property as SEZ. Nor does she deny that residential development of SEZ properties would in fact result in substantial adverse effects on the Lake.

e. TDRs represent the kind of state and local property rights innovation that courts should encourage. Nature presented the TRPA with a daunting task in the Lake Tahoe Basin. At risk was the vitality of both economic and environmental interests dependent on the Lake's not being irremediably destroyed.

The TRPA developed the program that petitioner challenges based on years of negotiation and consensus

building workshops involving all interested parties. See page 7, *supra*. The carefully balanced regime of developmental restrictions and enhancements ultimately enacted represents a commendable, good faith governmental effort to develop an innovative program for reconciling the varied competing developmental and environmental interests in the Lake Tahoe Basin. Rather than being a mere "ruse" or "administrative contrivance" (Pet. Br. 5, 20, 30), the TRPA program represents the very kind of innovative and "novel social and economic experiment[]" that warrants heightened judicial deference and avoidance of judicial second-guessing in constitutional adjudication. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

That the innovations herein challenged are the product of a bi-state agency rather than "a single courageous State" (*id.*) renders them all the more warranting of judicial encouragement. Nevada and California overcame substantial political obstacles in jointly embarking on their cooperative effort to protect the interests of both of their citizens and the nation as a whole in Lake Tahoe. The kinds of compromises necessary to achieve the high level of interstate cooperation and sophisticated, coordinated planning efforts now implemented by the TRPA did not come easy. See S. Rep. 91-510, *supra*, at 5; Strong, *supra*, at 116-147; Comment, *The Future of a National Asset, supra*, 52 Cal. L. Rev. at 565-572; Comment, Gary J. Spradling, *Regional Government for Lake Tahoe*, 22 Hastings L. J. 705 (1971).

Petitioner's harsh characterization of the TDR program and the related development restrictions fails to appreciate the very real complexities government faces in regulating the exercise of private property rights mutually dependent on



preservation of a common natural resource, like Lake Tahoe.[32] No one's interest -- private property or otherwise -- is long served by a property rights regime that ignores nature's true complexity. "'"Property" * * * relate[s] to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'" *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972), quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting); see *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law * * *." ); see also John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1259-1281 (1996).

In the past, for instance, states properly reformed private property rules applicable to oil and gas development when it became increasingly clear that then existing rules would lead to waste and inefficiency. The interdependencies necessarily created by private rights in common natural resources required innovations in private property rules, including pooling and unitization requirements. See Howard R. Williams, Richard G. Maxwell, Charles J. Meyers, & Stephen F. Williams, Oil and Gas -- Cases and Materials, 773-930 (5th ed. 1987). This Court has repeatedly upheld such state laws against constitutional challenge, including

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[32] An alternative proposed by petitioner's amici only underscores the reasonableness of the TRPA program. Consistent with petitioner's extreme view that property owners possess an inherent, fundamental constitutional right to develop property to its highest and best use, amicus proposes that the only constitutional approach to TDRs is for the government to condemn all development rights in the first instance and then auction them off for resale. Amicus Br. Institute for Justice 16-24. Yet, amicus itself candidly acknowledges that such a program is "unlikely" ever to be enacted. *Id.* at 24.

takings claims. See, *e.g. Ohio Oil Co. v. Indiana*, 177 U.S. 190, 210 (1900); *Lindsley v. Natural Carbonic Gas. Co.* 220 U.S. 61, 74-77 (1911); see also *Walls v. Midland Carbon Co.*, 254 U.S. 300, 323-24 (1920).

Analogous challenging circumstances exist in Lake Tahoe. The economic and ecologic viability of the Tahoe Basin, including the private property rights enjoyed therein, depend on the Lake. And the ecological vitality of the Lake in turn depends on careful, comprehensive regulation of activities in the Basin. The value of the lands surrounding Lake Tahoe are as susceptible to wasteful destruction as the oil and gas resources at stake earlier this century.

Petitioner nonetheless posits an extreme, static view of property rights under which government must either allow every landowner to build on their property or pay them "just compensation" not to do so. Under petitioner's view, the downstream adverse effects on shared natural resources have no bearing on the government's ability to restrict development or on its obligation to pay compensation. Nor is it at all relevant that the government's efforts have resulted in enduring economic value to petitioner's own property rights.

As demonstrated by the very facts of this case, such an extreme view of private property rights is not supported by basic fairness or justice concerns, or this Court's precedent. Even private property rights themselves would ultimately be undermined rather than protected by petitioner's extreme view. Where, as in this case, private property rights themselves are dependent on preservation of a common, fragile, ecological resource, like Lake Tahoe, the greatest threat to private property rights may, ironically, be the



assertion of absolute rights in private property that bear no relation to the physical world.[33]

Petitioner, relying on the theoretical writings of Friedrich A. Hayek and Robert Nozick, invites this Court to create, as a matter of federal constitutional law, a fundamental right to develop property capable "of performing its crucial social function of providing a bulwark of personal autonomy against the encroachments of an aggressive, overreaching state." Pet. Br. 21, 22 & n.27. However, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics * * * [or] embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Nor does the Constitution enact the controversial theories of either Hayek or Nozick. Petitioner's invitation, accordingly, should be declined.[34]

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[33] Carol M. Rose, *Property as the Keystone Right*, 71 Notre Dame L. Rev. 329, 365 (1996) ("[T]he in-your-face rhetoric of property rights can undermine actual institutions of property, suggesting that anything goes, and that the property owner need not care in the least for his fellows. That is not what makes property work to make a society richer. And it is not what makes a democracy work to make a society freer.")

[34] Should the Court, contrary to our submission, conclude that petitioner's claim is ripe, the Court should remand the case back to the lower courts for consideration of the merits of petitioner's regulatory taking claim. Because the only issue raised by the petition for a writ of certiorari is the threshold jurisdictional issue of ripeness, that is the only issue to "be considered by the Court." S.Ct. R. 14.1. On remand, the district court would decide the takings issue in the first instance under the framework announced by this Court in *Penn Central*. Petitioner is mistaken in assuming that the merits will turn on application of this Court's ruling in *Lucas*. Regardless of this Court's disposition of the ripeness issue in this case, the *Lucas* per se takings test for regulations that deprive owners of real property of all economic value will not apply

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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here. See Amicus Br. National League of Cities. The district court has already preliminarily found that, wholly apart from the TDRs, petitioner's property may retain significant residual economic value for possible resale to neighbors. See note 23, *supra*. Hence, whether the TRPA ordinances amount to a taking as applied to petitioner's property will necessarily require substantially more factual inquiry into relevant considerations including, *inter alia*, the reasonableness of petitioner's investment-backed expectations in light of development restrictions existing before and since her purchase, the reasons why petitioner's neighbors were previously allowed to build homes on their properties, the reasonableness of the regulatory means as well as the ends, petitioner's intent and ability to develop since 1972, and any "reciprocity of advantage" petitioner herself enjoys as a result of the very restrictions that she challenges. See *Lucas*, 505 U.S. at 1035-1036 (Kennedy, J., concurring); Amicus Br. League to Save Lake Tahoe 21-27.

## APPENDIX

### RELEVANT PROVISIONS OF THE TAHOE REGIONAL PLANNING AGENCY CODE OF ORDINANCES

Chapter 6 (Findings Required) . . . . . A-2

Chapter 20 (Land Coverage Standards) . . . . . A-3

Chapter 21 (Density) . . . . . A-14

Chapter 25 (Best Management Practice Requirements) . . A-16

Chapter 33 (Allocation of Development) . . . . . A-17

Chapter 34 (Transfer of Development) . . . . . A-26

Chapter 35 (Bonus Unit Incentive Program) . . . . . A-33

Chapter 37 (Individual Parcel Evaluation System) . . . . . A-37

## CHAPTER 6

## FINDINGS REQUIRED

6.0 Purpose: The Tahoe Regional Planning Compact requires TRPA to make findings before taking certain actions. In addition, the Regional Plan package, including the Code and plan area statements, sets forth other findings which must be made. This chapter sets forth procedures describing how TRPA shall make the findings required.

6.1 Applicability: Prior to approving any project or taking any other action specified herein, TRPA shall make the findings required by the provisions of the Regional Plan package, including the Goals and Policies, the Code, and specifically, this chapter and any other requirement of law. All such findings shall be made in accordance with this chapter.

* * * * *

6.3 Threshold-Related Findings: The following specific findings shall be made, pursuant to Articles V(c), V(g) and VI(b) of the Compact in addition to any other findings required by law.

6.3.A Findings Necessary To Approve Any Project: To approve any project, TRPA must find, in accordance with Sections 6.1 and 6.2, that:

(1) The project is consistent with, and will not adversely affect implementation of the Regional Plan, including all applicable Goals and Policies, plan area statements and maps, the Code and other TRPA plans and programs.

(2) The project will not cause the environmental threshold carrying capacities thresholds to be exceeded; and



(3) Wherever Federal, State or local air and water quality standards applicable for the region, whichever are strictest, must be attained and maintained pursuant to Article V(d) of the Tahoe Regional Planning Compact, the project meets or exceeds such standards.

## CHAPTER 20

## LAND COVERAGE STANDARDS

20.0 Purpose: This chapter sets forth regulations for the permissible amount of land coverage in the Region. It implements provisions of the Goals and Policies concerning the land capability system, land capability districts, prohibition of additional land coverage in certain land capability districts, and transfer and mitigation of land coverage.

20.1 Applicability: All land coverage shall be regulated pursuant to the provisions of this chapter.

* * * * *

20.3 Land Coverage Limitations: No person shall create land coverage in excess of the limitations set forth in this chapter. The means to determine base land coverage, the manner to transfer land coverage and prohibitions of certain land coverage are set forth in this Section.

20.3.A Base Land Coverage Requirements: The allowable base land coverage ("base coverage") shall be determined by using the coefficients set forth in the report entitled, Land Capability Classifications of the Lake Tahoe Basin, Bailey, R. G. 1974. These coefficients are:

| Lands Located in Land Capability District* | Base Coverage |
|---|---|
| 1a, 1b, 1c | 1% |
| 2 | 1% |
| 3 | 5% |
| 4 | 20% |
| 5 | 25% |
| 6, 7 | 30% |

*Lands located in Geomorphic Group I are classified land capability district 1 and are permitted one percent coverage.

(1) General Rule: Except as provided in subparagraphs 20.3.A(2), (3) and (4), the coefficients shall be applied to the project area in accordance with Subsection 20.3.D.

* * * * *

20.3.C Manner Of Transferring Land Coverage: Land coverage may be transferred to eligible parcels for eligible uses, in accordance with the percentage limitations, as set forth in Subsection 20.3.B, and the requirements of this subsection. A transfer of land coverage shall be from one parcel or project area to another and shall only be transferred in conjunction with a project approved by TRPA. Land coverage banks may be designated by TRPA pursuant to Section 38.8, to provide land coverage for transfer purposes.

* * * * *

(3) Sending Parcels Classified As Sensitive Lands: If land coverage is transferred from a



sending parcel, or a portion thereof, that is located in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired as set forth in Subparagraph 20.3.C(7) below, and may not be returned to the sending parcel.

(4) Sending Parcels Classified As Non-Sensitive Lands: If land coverage is transferred from a sending parcel, or a portion thereof, that is located in Land Capability Districts 4 through 7, inclusive, or is above the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be retired as set forth in Sub paragraph 20.3.C(7) below, but the land coverage may be returned to the sending parcel subject to the limitations of Subsections 20.3.A and 20.3.B.

(5) Hydrologically Related Area Transfer Limitation: For all land coverage transfers, the receiving parcel and the sending parcel shall be in the same hydrologically related area. The hydrologically related area boundaries are depicted upon the TRPA Plan Area Overlays and are incorporated herein. Transfer across said boundaries is prohibited.

* * * * *

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired

permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provisions for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.

(b) Removal Of Land Coverage For Credit: In the event land coverage is removed on one parcel, but is not proposed for immediate transfer to another parcel, the applicant shall comply with Subparagraphs 20.3.C(7)(a)(i) and (ii), to assure credit for the removed coverage in accordance with Chapter 38.

(8) Land Bank: Land coverage transfers and land



coverage retirement programs may use a land bank pursuant to Chapter 38.

20.4 Prohibition Of Additional Land Coverage In Land Capability Districts 1a, 1c, 2 And 3 And 1b (Stream Environment Zones): No additional land coverage or other permanent land disturbance shall be permitted in Land Capability Districts 1a, 1c, 2, and 3 and Land Capability District 1b (stream environment zones) except as follows:

20.4.A Exceptions For Land Capability Districts 1a, 1c, 2 And 3 Prohibition: The following exceptions apply to the prohibition of land coverage and disturbance in Land Capability Districts 1a, 1c, 2 and 3:

(1) IPES: Land coverage and disturbance for single family houses may be permitted in Land Capability Districts 1a, 1c, 2 and 3, when reviewed and approved pursuant to IPES in accordance with Chapter 37.

(2) Public Outdoor Recreation Facilities: Land coverage and disturbance for public outdoor recreation facilities, which includes public recreation projects on public lands, private recreation projects through use of public lands, and private recreational projects on private lands that are depicted or provided for on a public agency's recreational plan, may be permitted in Land Capability Districts 1a, 1c, 2 and 3 if TRPA finds that:

(a) The project is a necessary part of a public agency's long-range plans for public outdoor recreation;

(b) The project is consistent with the

Recreation Element of the Regional Plan;

(c) The project, by its very nature, must be sited in Land Capability Districts 1a, 1c, 2 or 3, such as a ski run or hiking trail; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3, or SEZs), Water Quality Management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which avoids or reduces the extent of encroachment in Land Capability Districts 1a, 1c, 2 and 3; and

(e) The impacts of the coverage and disturbance are fully mitigated through means including, but not limited to, the following:

(i) Application of best management practices; and

(ii) Restoration, in accordance with Section 20.4.C, of land in Land Capability Districts 1a, 1c, 2 and 3 in the amount of 1.5 times the area of land in such districts covered or disturbed for the project beyond that permitted by the coefficients in Subsection 20.3.A.



(3) Public Service Facilities: Land coverage and disturbance for public service facilities may be permitted in Land Capability Districts 1a, 2c, 2 and 3 if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in Land Capability Districts 1a, 1c, 2 and 3; and

(c) The impacts of the coverage and disturbance are fully mitigated in the manner prescribed by Subparagraph 20.4.A(2)(e).

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability Districts 1a, 1c, 2 and 3 for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects, and similar projects, programs and facilities if TRPA finds that:

(a) The project, program or facility is necessary for environmental protection; and

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent

of encroachment in Land Capability Districts 1a, 1c, 2 and 3.

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

(5) Tyrolian Village: Land coverage and disturbance for single family houses may be permitted in Land Capability Districts 1a, 1c, 2 and 3, when reviewed and approved in accordance with Chapter 36, on parcels in Tyrolian Village, Units #1 through 5, inclusive, for which complete applications were filed and accepted by TRPA pursuant to the "Agreement Between The Tyrolian Village, Inc. And The Tahoe Regional Planning Agency Regarding Erosion Control Improvements And Reclassification Of Upper Tyrolian Village" dated May 26, 1983."

20.4.B Exceptions For Land Capability District 1b (Stream Environment Zone): The following exceptions apply to the prohibition of land coverage and disturbance in land capability district 1b (stream environment zone):

(1) Stream Crossings: Land coverage and disturbance for projects to effect access across stream environment zones to otherwise buildable sites, if such projects otherwise comply with applicable development standards in Chapter 27, may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:



(a) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone, or that encroachment is necessary to reach the building site recommended by IPES; and

(b) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(2) Public Outdoor Recreation: Land coverage and disturbance for public outdoor recreation facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is a necessary part of a public agency's long range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature must be sited in a stream environment zone, such as bridges, stream crossings, ski run crossings, fishing trails, and boat launching facilities; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage

or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3 or SEZs), Water Quality Management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which would avoid or reduce the extent of encroachment in the stream environment zone; and

(e) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(3) Public Service: Land coverage and disturbance for public service facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including a bridge span or relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) The impacts of the land coverage and



disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability District 1b (stream environment zones) for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar projects, programs and facilities if TRPA finds that:

(a) The project, program, or facility is necessary for environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

* * * * *

## CHAPTER 21

## DENSITY

Chapter Contents


21.0 Purpose
21.1 Applicability
21.2 Maximum Density
21.3 Table of Maximum Densities
21.4 Calculation Of Maximum Density
21.5 Existing Density
21.6 Developments Rights


21.0 Purpose: The purpose of this chapter is to establish maximum densities, to set forth methods for calculating maximum densities, and to distinguish development rights from density.

21.1 Applicability: The provisions of this chapter are applicable to all projects and activities. This chapter applies primarily to residential uses, tourist accommodations, developed campgrounds, recreational vehicle parks, and group recreation facilities.

* * * * *

21.6 Development Rights: Development rights, as defined in Chapter 2, shall be assigned and utilized in accordance with the following provisions:

21.6.A Legally Existing: Parcels legally existing on the effective date of the Regional Plan, July 1, 1987, shall be assigned a development right except as set forth below:

(1) Parcels which are located in Land Capability Districts 4, 5, 6, or 7, are within a community plan area, and are eligible for tourist accommodation or commercial uses, shall not have a development right.



(2) Parcels that contained one or more of the primary uses listed in the Section 18.3 under Residential, Tourist Accommodation, Commercial, or Public Service, on the effective date of the Regional Plan, shall not have a development right, except as otherwise provided in Subsection 21.6.D.

(3) Parcels that contained one or more of the primary uses listed in Section 18.3 under Recreation, on the effective date of the Regional Plan, shall not have a development right, except that parcels with only dispersed outdoor recreation as a primary use shall have a development right.

(4) Parcels that contain one or more of the following uses in Section 18.3 under Resource Management, on the effective date of the Regional Plan, shall not have a development right:

(a) Tree farms;
(b) Farm/ranch accessory structure;
(c) Grazing;
(d) Range pasture, management;
(e) Range improvement; or
(f) Open space.

(5) Littoral parcels that contain one or more of the primary uses listed in Section 51.2, on the effective date of the Regional Plan, shall not have a development right, except that a parcel with the primary use of dispersed water-oriented, outdoor recreation, salvage operations, or safety and navigation facilities shall have a development right.

(6) Parcels which are burdened by an easement or other restriction incompatible with a residential use;

(7) Parcels which were created as a result of an eminent domain or similar government action or are otherwise remnants of a prior transaction, and which do not contain sufficient area to construct a single-family residence; and

(8) Parcels which were created for the purpose of public service uses or easements, including, but not limited to, public utilities and public recreation.

21.6.B Transfer of Development Rights: Transfer of development rights shall comply with the density limitations set forth in this chapter and the transfer provisions set forth in Chapter 34.

21.6.C Construction of Residential Unit: A development right or multi-residential bonus unit shall be required for each additional residential unit approved in accordance with Chapter 33.

21.6.D Parcels Containing a Residential Unit Destroyed by Calamity: A parcel containing a residential unit on the effective date of the Regional Plan, which unit is destroyed or damaged by fire or other similar calamity, shall have a development right.

## CHAPTER 25

## BEST MANAGEMENT PRACTICE REQUIREMENTS

Chapter Contents

25.0 Purpose
25.1 Applicability
25.2 Project Compliance Program
25.3 BMP Retrofit Program
25.4 Priority For Installation Of Retrofitting Measures



25.5 Standard BMP Requirements
25.6 Additional Requirements
25.7 Special Circumstances
25.8 Maintenance Of BMPs

25.0 Purpose: This chapter sets forth the requirements for installation of Best Management Practices (BMPs) for the protection or restoration of water quality.

25.1 Applicability: BMPs, as described in the Handbook of Best Management Practices (Volume II of the Lake Tahoe Basin Water Quality management Plan), or equivalent practices approved by TRPA, shall be applied to all public and privately owned lands.

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## CHAPTER 33

## ALLOCATION OF DEVELOPMENT

Chapter Contents

33.0 Purpose
33.1 Applicability
33.2 Allocation Of Additional Residential Units
33.3 Allocation Of Additional Commercial Floor Area
33.4 Allocation Of Additional Tourist Accommodation Units
33.5 Regulation Of Additional Public Service Facilities
33.6 Regulation Of Additional Recreation Facilities
33.7 Election Of Conversion Of Use
33.8 Other Permits

33.0 Purpose: This chapter sets forth the requirements for regulating the rate and timing of growth within the region. In conjunction with other provisions of this Code and the Goals and Policies, this chapter, through issuance of allocations, distributes, in an orderly fashion, growth and development within the confines of attainment and maintenance of the environmental

thresholds. An allocation issued pursuant to this chapter does not give the recipient thereof a right to develop a project.

33.1 Applicability: No person shall construct a project or commence a use or activity, which requires an allocation unless an allocation is obtained in accordance with this chapter; the parcel is eligible to use an allocation; and the project is approved by TRPA. For purposes of this chapter, where the term "existing" is used it shall not include structures or facilities that have become derelict. (See Chapter 2.)

33.2 Allocation Of Additional Residential Units: TRPA shall allocate the development of additional residential units as follows:

33.2.A Requirement Of Allocation: No person shall construct a project or commence a use, which creates one or more additional residential units, without first receiving an allocation approved by TRPA. This requirement does not apply to affordable housing units approved after January 1, 1986, but shall apply to conversions of such affordable housing to nonaffordable status. In order to construct the project or commence the use, to which the allocation pertains, the recipient of the allocation shall comply with all other applicable provisions of this Code.

(1) Applicable Residential Uses: The following residential uses referred to in Chapter 18 contain residential units: secondary residences; employee housing; mobile home dwellings; multiple family dwellings; multi-person dwellings; nursing and personal care facilities; residential care facilities; single family dwellings; and summer homes.



(2) Definition Of "Additional Residential Unit": Residential unit is defined in Chapter 2. A residential unit is considered "additional" if it is to be created pursuant to a TRPA approval issued on or after January 1, 1986. The conversion of an existing nonresidential use to a residential use constituting a residential unit is an additional residential unit requiring an allocation under this chapter. The following are not "additional" residential units:

(a) The reconstruction or replacement, on the same parcel, of a residential unit legally existing on or approved before January 1, 1986;

(b) The reconstruction or replacement, on the same parcel, of a residential unit which was allocated and approved pursuant to this Code;

(c) Legally established additions and accessory uses to an existing residential structures, that do not create additional residential dwelling units;

(d) A residential unit constructed on a foundation, the use of which is authorized by Chapter 11.

(e) The relocation of residential units legally existing on January 1, 1986, other than mobile home dwellings, through a transfer approved by TRPA;

(f) The relocation of a legally established mobile home dwelling with existing water, sewer, and electrical services to a

mobile home development or to a multi-family dwelling of five units or more, pursuant to a transfer approved by TRPA; or

(g) An existing, legally established mobile home pad with water, sewer and electrical services, whether or not a mobile home is located thereon.

(3) Maximum Number Of Units And Distribution Of Allocations Among Jurisdictions: From January 1, 1992 to December 31, 1996, a maximum of 1,500 additional residential units may be authorized to receive permits for construction. The allocation and distribution of these units shall be pursuant to the following table: [table omitted]

(a) A total of 1600 additional multi-residential development rights shall be available for the 20-year life of this Plan as bonus units in conjunction with transfer of development rights and/or other TRPA incentive programs designed to attain the goals and objectives of this Plan. Multi residential units shall be subject to the foregoing allocation limitations.

(b) Unused allocations may be added to a jurisdiction's successive year's allocations through 1996.

(c) Allocations assigned to the City of South Lake Tahoe and the STPUD service area within El Dorado County may be assigned to parcels within either



jurisdiction provided the sending jurisdiction approves the reassignment. Such reassignment shall not be considered an allocation transfer.

(d) 1992 allocations assigned to the City of South Lake Tahoe and the STPUD service area within El Dorado County shall not be issued unless it is determined that sufficient disposal capacity exists.

(e) In the event a lack of sewage capacity results in an imbalance of allocations to the STPUD service area, TRPA shall develop a program to recognize the imbalance for the year 1993 and beyond, if sewage capacity becomes available.

33.2.B Distribution And Administration Of Residential Allocations: Residential allocations shall be distributed and administered in accordance with the Goals and Policies, this Code, and the Rules of Procedure.

(1) Distribution Systems Requirement: Distribution of allocations for 1993 and beyond shall be by a method or system which permits the participation of parcels with scores below the numerical level defining the top rank in the applicable jurisdiction.

(a) TRPA shall reserve 10 percent of each jurisdiction's annual allocations for distribution to parcels below the IPES line. The reserved allocations shall be distributed by a method of random selection by TRPA. A county or city

may elect to distribute the reserved allocations, or may be exempt from the set-aside requirement, provided TRPA finds the substitute system or the city/county distribution system, as the case may be, provides an equal or superior opportunity for participation of parcels below the IPES line.

(b) Allocations distributed by TRPA under this subsection may either be transferred or returned to TRPA for reissuance to the jurisdiction of origin.

(c) A complete application for transfer of a reserved allocation shall be filed no later than June 1 of the year it was distributed.

(d) Upon transfer of a reserved allocation, a complete application for an additional residential unit shall be filed no later than December 31, 1994. Failure to submit a complete application for a transfer by June 1, 1994 or to file a complete application for a new residential unit by December 31, 1994 shall result in the forfeiture of the allocation to the jurisdiction of origin.

(2) Distribution: Distribution of allocations, within the limits set in Subsection 33.2.A and consistent with subparagraph (1) above, shall be determined by the counties and city. If any county or city chooses not to distribute allocations within its jurisdiction, then TRPA shall distribute the allocations pursuant to an allocation system adopted by TRPA.



(a) Each county and the city shall notify TRPA, in writing, of its election to distribute allocations for a given year or years. Notification must be received by TRPA no later than December 31 of the preceding year. The Governing Board may waive this deadline for good cause.

(b) TRPA shall deliver allocations to the counties and city no later than January 15, of the year for which the allocations are reserved, or within 15 days of the effective date of an ordinance providing for residential allocations for that year, whichever is later.

(c) Allocations which are carried over from previous years shall be delivered to the counties and city within 15 days of a determination by TRPA that the allocations are unused and may be reissued.

(d) Delivery of allocations shall be accomplished by providing each county and city with the number of allocation forms which corresponds to the allocations available to each county and city in that year. The counties and city shall determine the receiving parcels pursuant to their respective allocation systems and shall indicate the assessor's parcel number (APN) of the receiving parcel on the allocation form. The counties and city shall provide TRPA with a list of assessor parcel numbers which received an allocation. The original allocation forms shall be delivered to the owner of record of the

receiving parcel and shall, in addition to the list, constitute evidence of receipt of an allocation.

(e) TRPA shall number each allocation as follows:

(i) The first set of letters shall signify the county or city of origin (e.g., WA, DG, PL, EL, SLT);

(ii) The first set of numbers shall signify the year of issuance (e.g., 87, 88, 89, 90, 91);

(iii) The second set of letters shall signify the type of allocation (e.g., O for original, R for reissued, LS for litigation settlement);

(iv) The second set of numbers shall signify the sequence of the allocation (e.g., for Douglas County the sequence will be 1 through 23). (Example PL - 87 - R - 56 County-Year-Type-Number)

(f) The counties and city shall notify each owner of a parcel receiving an allocation.

(g) In the event an allocation is returned or forfeited for any reason, the county or city shall notify TRPA by returning the original allocation form and requesting a reissued allocation for assignment to another parcel. If the original allocation form cannot be returned to TRPA, the county or city shall notify TRPA of the



reason therefor, and the allocation shall be canceled by depositing in the U. S. Mail, first class, postage prepaid, a notice of cancellation addressed to the last known address of the owner of the receiving parcel.

(3) Administration: An allocation shall entitle the owner of the receiving parcel to either apply for a TRPA permit to construct an additional residential unit or to transfer the allocation to another parcel pursuant to Chapter 34. Distribution of, and other transactions concerning allocations, shall be tracked, accounted for and otherwise treated in accordance with Chapter 38.

(a) Upon receipt of the allocation form from the county or city, the owner of the parcel may file an application with TRPA to either construct a residential unit or transfer the allocation. Failure to either file a complete application or complete a transfer by the deadlines set in subparagraphs (b) and (c) below, shall result in the forfeiture of the allocation to the county or city of origin.

(b) Except as set forth in Section 33.2.C, Multi-Residential Allocations, and subparagraph (d), below, complete applications for construction of additional residential units shall be filed with TRPA no later than December 31 of the year in which the allocation was distributed.

(c) Transfer of allocations shall be complete no later than December 31, of

the year in which the allocation was distributed. Transfers of allocations shall be deemed complete when the applicant has received a TRPA notice of eligibility for the transfer and the original allocation form has been signed by the owners of the transferor and transferee parcels, the county or city which issued the allocation, and TRPA. The signatures of the receiving and sending county or city shall be required for intercounty transfers.

(d) Upon transfer of an allocation, a complete application for an additional residential unit shall be filed no later than June 1 of the year after the issuance of the allocation. Failure to file a complete application by June 1 shall result in the forfeiture of the allocation to the city or county of origin.

## CHAPTER 34

## TRANSFER OF DEVELOPMENT

Chapter Contents


34.0 Purpose
34.1 Applicability
34.2 Transfer Of Residential Development Right
34.3 Transfer Of Residential Allocations
34.4 Transfer Or Relocation Of Existing Development
34.5 Restriction Or Retirement Of Parcels
34.6 Basic Service Requirements


34.0 Purpose: This chapter sets forth the provisions for the transfer of residential development rights, residential allocations, and existing development, from one parcel



to another as provided in the Goals and Policies, Development and Implementation Priorities Subelement, Implementation Element, Goal #3, Policies 1 - 5. The transfer of land coverage is addressed in Chapter 20.

34.1 Applicability: This chapter applies to the transfer of residential development rights, residential allocations, and existing development. All such transfers require TRPA approval. Transfer of a residential development right or allocation does not constitute a project approval. Transfers of existing development can occur only in conjunction with a project.

34.2 Transfer Of Residential Development Right: A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;

34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or community plan where residential uses are permissible and shall meet the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or,

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.



34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

* * * * *

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transferred.

34.4 Transfer Or Relocation Of Existing Development: Certain elements of existing development may be transferred or relocated from one parcel to another if the receiving parcel is in a plan area or community plan area designated as a receiving area for existing development. Existing residential development may be transferred to any plan area where residential use is a permissible use. The transfer of existing development shall not be considered additional development and is exempt from the applicable allocation system.

* * * * *

34.5 Restriction Or Retirement Of Parcels: Restriction or retirement of parcels, or portions of parcels, for the purposes set forth in this Code, shall comply with the following requirements:

34.5.A Land Coverage: Parcels from which land coverage has been transferred are subject to provisions of Chapter 20.

34.5.B Allocation Transfer: Parcels from which allocations have been transferred shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.C Existing Development Transfer: For parcels from which units of existing development have been transferred, the structures or facilities accounting for that use shall be removed or modified and the land restored and maintained in as natural a state as is possible, so as to eliminate the units transferred.

* * * * *

34.5.E Transfer Of All Existing Development From Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZ, from which all units of existing development have been transferred, shall be restored pursuant to Subsection 34.5.C and shall be permanently restricted to open space by a deed restriction, or other covenant running with land, recorded by the owner.



34.5.F Transfer Of Some Existing Development From Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZs, from which less than all units of existing development have been transferred, shall be permanently restricted from transferring development back to the parcel by deed restriction, or other covenant running with the land, recorded by the owner.

34.5.G Transfer Of Existing Development From Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6, or 7, from which units of existing development have been transferred, shall be restricted by deed restriction, or other covenant running with the land, recorded by the owner. The restriction shall limit the units of use to any remaining, until or unless:

(1) A transfer back to the parcel, is approved by TRPA pursuant to this chapter;

(2) An allocation is obtained pursuant to an approved community plan; or

(3) Results in the elimination of nonconforming use.

34.5.H Development Rights Transfer On Sensitive Lands: Parcels in Land Capability Districts 1a, 1b, 1c, 2, or 3, or SEZ, from which all residential development rights have been transferred, shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be

recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.I Development Right Transfer On Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6 and 7, from which all residential development rights have been transferred, shall be restricted to open space by deed restriction, or other covenant running with the land, recorded by the owner, but shall be eligible to receive future transfers of coverage or units of use if otherwise permitted in (1), (2) and (3) of Subsection 34.5.G above.

* * * * *



# CHAPTER 35

# BONUS UNIT INCENTIVE PROGRAM

Chapter Contents

35.0 Purpose
35.1 Applicability
35.2 Multi-Residential Incentive Program
35.3 Tourist Accommodation Bonus Unit Program
35.4 Determination of Project Cost

35.0 Purpose: This chapter sets forth provisions for assigning multi-residential and tourist accommodation bonus units in accordance with the Goals and Policies, Land Use Element, Land Use Subelement, Goal #2, Policies 5A and 5B, and Implementation Element, Development and Implementation Subelement, Goal #2, Policies 2F and 3, and Goal #3, Policies 1 and 2.

35.1 Applicability: The assignment of multi-residential and tourist accommodation bonus units shall comply with the provisions set forth in this chapter. Such assignments shall occur only in conjunction with a project approved by TRPA.

35.2 Multi-Residential Incentive Program: Multi-residential bonus units may be approved for use only on parcels located in plan areas or community plans designated as eligible for the Multi- Residential Incentive Program.

35.2.A Assignment Of Bonus Units: Pursuant to Chapter 13, a maximum of 1,600 multi-residential bonus units shall be assigned to plan areas.

35.2.B Criteria: All projects receiving multi-residential bonus units pursuant to this chapter shall comply with the following criteria:

(1) The proposed density, including any multi-residential bonus units, shall not exceed the maximum density limits set forth in the plan area statement, applicable community or redevelopment plan, or this Code.

(2) Multiple family dwellings shall be designated in the plan area or community plan as an allowed use, or a special use for which the findings required in Section 18.1 have been made.

(3) The project shall be located within a plan area or community plan designated as eligible for the Multi-Residential Incentive Program.

(4) The multi-residential bonus units received by the project shall not exceed the number of multi-residential bonus units assigned to the plan area or community plan in which the project is located.

(5) Except for affordable housing units, an allocation shall be required pursuant to Chapter 33 in order to utilize ulti-residential bonus units.

35.2.C Determination Of The Number Of Bonus Units: Applications for projects proposing the use of residential bonus units shall include a list and description of all mitigation measures identified in Subsection 35.2.D that are proposed as part of the project. Based on review of the list and description of the mitigation measures proposed, TRPA shall determine a score for the project in accordance with Subsection 35.2.D. One residential bonus unit may be approved for each ten points received by a project. Bonus units, so



determined, may be reserved for projects based on the proposals submitted prior to project approval to enable applicants to accumulate allocations. Bonus units shall be assigned to a parcel and may be reserved as credits, unused, for no more than five years. TRPA may reissue those credits to the same parcel for an additional five years, if TRPA finds that the bonus units are likely to be used during that period.

* * * * *

35.2.D Mitigation Measures: Projects proposing the use of multi-residential bonus units shall receive a score only when one or more of the following mitigation measures are proposed as part of the project. Any combination of the listed measures may be proposed. Only those mitigation measures that would not other wise be required by the Code shall be considered in determining the score received by a project. This subsection establishes the maximum number of points that may be awarded for each mitigation measure. When a mitigation measure satisfies the requirements of two or more of the mitigation measures listed below, points shall be awarded based on the mitigation measure resulting in the highest score. The total point score shall be rounded down to a number which is a multiple of ten.

* * * * *

(3) Provision of stream zone restoration pursuant to TRPA's Stream Environment Zone Restoration Program (excluding restoration required as mitigation for new SEZ disturbance) - (project cost divided by $5,000)

x 20 points.

(4) Retirement, in accordance with Chapter 34, of an undeveloped parcel located in Land Capability Districts 1a, 1b (SEZ), 1c, 2, or 3:

(a) If the parcel is in Land Capability Districts 1a, 1c, 2, or 3 - 10 points per transferred unit.

(b) If the parcel is in Land Capability District 1b or in a stream environment zone - 30 points per transferred unit.

(5) Transfer of existing residential unit and retirement of the parcel in accordance with Chapter 34:

(a) If the parcel is in Land Capability Districts 1a, 1c, 2, or 3 - 10 points per transferred unit.

(b) If the parcel is in Land Capability District 1b or in a stream environment zone - 40 points per transferred unit.

(6) Provision of public access to recreation areas, lakes, streams, or vista points to which access was previously nonexistent - (project cost divided by $5,000) x 10 points (maximum 50 points).

(7) Projects proposing less land coverage than the maximum amount otherwise allowed in accordance with Chapter 20 shall receive one point for each such reduction of 600 square feet onsite.

(8) Participation in projects identified in the



TRPA approved Scenic Restoration Program - (project cost divided by $5,000) x 10 points.

* * * * *

## CHAPTER 37

## Individual Parcel Evaluation System

Chapter Contents

37.0 Purpose
37.1 Applicability
37.2 Evaluation Criteria
37.3 Procedures For Establishing SEZ Boundaries And Setbacks
37.4 Area To Be Evaluated
37.5 Evaluation Teams
37.6 Parcels Eligible For Evaluation
37.7 Most Likely Building Site
37.8 Ranking Of Parcels
37.9 Notification Of Property Owners
37.10 Change In IPES Score
37.11 Allowable Base Land Coverage

37.0 Purpose: This chapter establishes the Individual Parcel Evaluation System (IPES), and related procedures, in accordance with Goal #1, Policy 1 of the Development and Implementation Priorities Subelement, Implementation Element of the Goals and Policies. By December 31, 1988 all vacant residential parcels shall be evaluated, assigned a numerical score and ranked within each local jurisdiction from most suitable to least suitable for development in accordance with this chapter.

37.1 Applicability: Commencing on January 1, 1989, review and approval by TRPA of the construction of single family dwellings shall be in accordance with IPES.

Review and approval of applications for construction of single family dwellings under IPES shall not commence until all vacant residential parcels have been scored and ranked in accordance with IPES.

* * * * *

37.4.A(3) Parcels Containing A SEZ: Where a parcel contains an SEZ, the evaluation team shall evaluate only that portion of the parcel located outside the SEZ. The score received by parcels containing less than 5,000 square feet outside an SEZ shall be multiplied by a factor equal to the area outside the SEZ divided by 5,000 square feet. Parcels containing no area outside an SEZ or SEZ setback shall receive a total score of zero.

* * * * *

37.5 Evaluation Teams: The members of each evaluation team shall be selected by TRPA and shall consist of professionals in the fields of soil science, hydrology and engineering or planning.

* * * * *

37.8 Ranking Of Parcels: Once all eligible parcels within a particular jurisdiction have received a numerical score, the parcels shall be ranked, by jurisdiction, from the most suitable (those parcels receiving the highest numerical score)to the least suitable (those parcels receiving the lowest numerical score).

37.8.A Deadline For Ranking: Ranking of all eligible parcels shall be completed and considered for adoption by December 31, 1988.

37.8.B Establishment Of Level Defining Top Ranked



Parcels: By January 1, 1989, TRPA shall establish an initial numerical level in the rankings immediately above the most sensitive parcels. The initial level shall be at the same numerical value for all jurisdictions. Parcels having scores above the level established herein, and as lowered pursuant to Subsection 37.8.C, shall be the top ranked parcels within each jurisdiction.

(1) Procedure For Establishing Initial Numerical Level: Once all eligible parcels have received a score under IPES and TRPA has taken a final action on requests for reevaluation pursuant to Subsection 37.10.C, the initial numerical level defining the top ranked parcels shall be established by TRPA in accordance with the following procedures. Parcels determined by the IPES field evaluation teams to be located in a soil series not identified in the report entitled "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service and dated March 1974, shall be excluded from this procedure.

(a) A numerical value shall be established such that the number of vacant residential parcels located above the value equals the number of vacant residential parcels that on March 1, 1988 are shown on TRPA's Land Capability Overlay maps as having at least 51 percent of their area located in Land Capability Districts 4, 5, 6 and 7.

(b) A zone shall be established between the numerical values that are ten percent greater than and ten percent less than the

numerical value established under (a), above.

(c) Based on the soil series and average slope determined by the IPES field evaluation teams, parcels that would otherwise be classified as Land Capability District 3, in accordance with the soil series and slope ranges set forth for Land Capability District 3 lands in the Bailey Report, shall be identified and the arithmetic mean of the scores received by these parcels shall be determined.

(d) Based on the soil series and average slope determined by the IPES field evaluation teams, parcels that would otherwise be classified as Land Capability District 4, in accordance with the soil series and slope ranges set forth for Land Capability District 4 lands in the Bailey Report, shall be identified and the arithmetic mean of the scores received by these parcels shall be determined.

(e) The arithmetic mean of the values established under (c) and (d), above, shall be determined.

(f) If the value established under (e), above, is within the zone established in (b), above, then the initial numerical level shall be set at the value established under (e), above. If the value established under (e), above, is outside the zone established in (b), above, then the initial numerical level shall be set at the



numerical value of the zone boundary that is closest to the value established under (e), above.

37.8.C Lowering Numerical Level Defining Top Ranked Parcels: Provided TRPA makes the findings required under Subparagraph (1) of this Subsection, the numerical level defining the top ranked parcels in any jurisdiction shall be lowered, on an annual basis commencing on January 1, 1990, to include in the top rank a number of parcels equal to the number of parcels in that jurisdiction that used allocations during the previous year in accordance with Chapter 33.

(1) Required Findings: The numerical level defining the top ranked parcels shall not be lowered unless TRPA makes the following findings with respect to the applicable local jurisdiction:

* * * * *

37.8.E Eligibility To Compete For Allocation: All parcels receiving a score under IPES shall be eligible to compete for residential allocations. Top ranked parcels that receive a residential allocation may pursue issuance of a TRPA permit to construct a new single family house. Parcels with score below the level defining the top ranked parcels may, if in receipt of a residential allocation, exercise any of the options listed below:

(1) Transfer the allocation in accordance with Chapter 34;
(2) Relinquish the allocation; or
(3) Transfer other development rights in

accordance with Chapter 34.

* * * * *

37.11 Allowable Base Land Coverage: The allowable base land coverage for residential parcels evaluated under IPES shall be a function of the parcel's combined score under the IPES criteria for relative erosion hazard and runoff potential as correlated with the coverage coefficients and land capability districts of the Bailey Report. The allowable base land coverage under IPES shall be established in accordance with the following procedures and shall be considered for adoption by TRPA no later than January 1, 1989.

37.11.A Procedure For Establishing Allowable Base Land Coverage: Once eligible parcels have received a score under IPES, and TRPA has taken action on requests for reevaluation pursuant to Subsection 37.10.C, the percentage of allowable base land coverage shall be established by TRPA in accordance with the following procedures:

(a) Based on the soil series and average slope determined by the IPES evaluation teams, all parcels receiving a score under IPES shall be identified as to which of the seven capability classes established in the Bailey Report each parcel would have been classified. Parcels determined by the IPES evaluation teams to be located in a soil series not identified in the report entitled "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service and dated March 1974, shall be excluded from this procedure.



(b) The combined scores for Relative Erosion Hazard and Runoff Potential representing the central tendency within each capability class shall be determined. The central tendency shall be described by determining the mode value, or by alternative statistical methods, including mean or median values, whichever is appropriate.

(c) The central tendency scores established in (b), above, shall be plotted, in graph form, against percentages of allowable base land coverage ranging from one percent to thirty percent. The central tendency score for Land Capability Districts 1a, 1c, and 2, shall be plotted at one percent; for Land Capability District 3 at five percent; for Land Capability District 4 at 20 percent; for Land Capability District 5 at 25 percent; and for Land Capability Districts 6 and 7 at 30 percent. If the central tendency scores of any of the capability classes set forth in (c), above, are determined to be statistically indistinguishable, such classes shall be combined for purposes of establishing a central tendency score. If capability classes are combined, the central tendency score shall be plotted at the percentage that is the average of the percentages established for those classes in Subsection 20.3.A of the TRPA Code.

(d) TRPA shall develop a formula for a line passing through the points of central tendency plotted in accordance with (c),

above. No parcel shall be allowed more than 30 percent, or less than one percent base land coverage.

(e) Allowable base land coverage for parcels receiving a score under IPES shall be established in accordance with the formula developed in (d), above.

37.11.B Application Of Allowable Base Land Coverage Percentages: The percentages of allowable base land coverage established in accordance with Section 37.11 shall be applied as follows to determine the total allowable base land coverage:

(1) Parcels Of 1/3 Acre Or Less In Size: The percentage of allowable base land coverage shall be applied to the entire parcel area, except in cases where the parcel contains areas classified as SEZ or backshore. In such cases, the percentage of allowable base land coverage shall be applied to only that area outside the SEZ and backshore. The allowable base land coverage of one percent in the SEZ and backshore may be combined with the allowable base land coverage for the remainder of the parcel to establish a total allowable base land coverage for the parcel. A portion of the total allowable base land coverage for the parcel may be used to allow construction of access only through the SEZ, provided TRPA makes the findings required in Subparagraph 20.4.B(1), and through the backshore, provided TRPA makes the findings required in Section 55.4.

(2) Parcels Greater Than 1/3 Acre But Less Than 5 Acres In Size: The percentage of



allowable base land coverage shall be applied to the 1/3 acre evaluated by the evaluation team. If the owner of the parcel is able to identify a larger and contiguous area that has the same characteristics as the 1/3 acre originally evaluated and TRPA concurs, the percentage of allowable base land coverage shall be applied to the larger area. Allowable base land coverage on parcels that contain a SEZ shall be calculated in accordance with Subparagraph (1) above.

(3) Parcels Of Five Acres Or Greater In Size: The percentage of allowable base land coverage shall be applied to all that portion of the parcel that the evaluation team identifies as having the same characteristics as and being contiguous to the area evaluated.

Supreme Court, U.S.
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No. 96-243

In the

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent*.

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Ninth Circuit**

## REPLY BRIEF ON THE MERITS

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## INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a final decision by respondent Tahoe Regional Planning Agency (TRPA), prohibiting petitioner Bernadine Suitum from causing any "new land coverage or other permanent land disturbance" on her residential subdivision lot. Joint Appendix (App.) 26. Although TRPA's ruling establishes with certainty the nature and extent of development that will be permitted on Mrs. Suitum's land (none), the Ninth Circuit Court of Appeals found that the agency had not reached a "final decision" within the meaning of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Mrs. Suitum's regulatory takings claim was therefore found to be unripe, on the grounds that Mrs. Suitum was required to attempt to market certain administrative credits created by TRPA[1] and apply for the agency's approval of a sale of the credits to a third party. App. 160-63.

In response to Mrs. Suitum's brief on the merits to this Court, both TRPA and the amicus brief for the United States concede that Mrs. Suitum *has* in fact obtained a final decision within the meaning of *Williamson County*, but urge this Court to apply the earlier and more general ripeness doctrine of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Brief for Respondent (Resp. Brf.) at 18-25. Even if this Court were to accept this dubious invitation, Mrs. Suitum's claim is plainly ripe under the two-pronged standard of *Abbott Laboratories*. The only material dispute in the proceedings below was the value (if any) of TRPA's administrative credits. Since both parties have submitted evidence valuing these credits by ordinary appraisal methods, this controversy reduces to a factual dispute that is eminently fit for adjudication at trial. The second consideration under *Abbott Laboratories* is the hardship to the parties of withholding adjudication. This criterion also strongly favors Mrs. Suitum, an elderly widow who has already endured seven years of needless administrative and judicial delay, and whose legal claims may be foreclosed if she complies with the procedures required by the Ninth Circuit.

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[1] These credits are commonly but misleadingly referred to as "transferable development rights (TDRs)."

TRPA relies on *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), for the proposition that the resale value of its administrative credits "mitigates" the agency's liability for a taking. Resp. Brf. at 32-33. In fact, however, the "mitigating" effect of the TDRs at issue in *Penn Central* derived from the fact that they could actually be used by the plaintiff to facilitate more intensive development of its own surrounding property.[2] Here, TRPA's credits cannot restore or enhance any use of Mrs. Suitum's land, and their resale value is relevant, if at all, only to compensation.

Because the facts of this case fall squarely within the "categorical takings" doctrine of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court should remand with instructions that the only issue remaining for the trial court is determination of just compensation.

## I

## TRPA'S RETREAT FROM *WILLIAMSON COUNTY* TO *ABBOTT LABORATORIES* IS UNAVAILING

### A. TRPA Now Admits It Has Reached a Final Decision Within the Meaning of *Williamson County's* Ripeness Doctrine

In its opposition to Mrs. Suitum's petition for certiorari TRPA maintained--as it did before both lower courts--that Mrs. Suitum's takings claim is not ripe because she has not yet obtained a "final decision" regarding how she will be allowed to develop her land as required by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 190.[3] Now, in its response to Mrs. Suitum's brief on the merits to this Court, TRPA has changed its position and admits that

> we *do* know how far the regulation has gone .... ***We know the full extent of the regulation's impact in restricting petitioner's development of her own land***.
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> . . . .

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[2] 438 U.S. at 137.

[3] *See* Brief in Opposition to Petition for Certiorari at 11-16.



> To be sure, in most contexts, no further steps would be necessary to develop the necessary factual record where, as has occurred in this case, the governmental agency ***has reached a final decision regarding the extent of development permitted on a particular piece of land***.

Resp. Brf. at 21, 31 (emphasis added).[4]

Since the ruling below by the Court of Appeals rested entirely on the assertion that TRPA had ***not*** reached a final decision under *Williamson County*,[5] and it therefore could ***not*** be determined "how far the regulation goes,"[6] TRPA's admission on this point would seem to be dispositive of the issues presented for review by this Court. However, TRPA abandons its *Williamson County* ripeness argument only to aver that Mrs. Suitum's claim is not ripe under *Abbott Laboratories v. Gardner*, 387 U.S. 136.[7]

*Abbott Laboratories*, a case dealing with preenforcement challenges to federal regulations under the Administrative Procedure Act (APA), was not mentioned by the court below and has no obvious applicability to takings claims arising from local land use regulations. Nevertheless, even if this Court were to apply the prudential ripeness doctrine of *Abbott Laboratories* to the case at bar, it would find Mrs. Suitum's takings claim ripe for adjudication.

### B. Mrs. Suitum's Takings Claim Is Ripe for Adjudication Within the Meaning of *Abbott Laboratories*

In *Abbott Laboratories* this Court set forth two broad criteria for determining the ripeness of preenforcement challenges to federal regulations under the APA: the "fitness" of the issues for pre-enforcement adjudication and the hardship to the parties of

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[4] This admission is echoed by the amicus brief filed for the United States in support of TRPA: "Petitioner has ... satisfied the 'final decision' requirement, as applicable to the instant regulatory program." Brief for the United States at 24.

[5] *Suitum v. T.R.P.A.*, App. 160-63.

[6] *Id.* at 161.

[7] Resp. Brf. at 18-30; Brief for the United States at 24-27.

postponing judicial review.[8] Stretching these standards almost beyond recognition, TRPA argues that they favor postponing adjudication of Mrs. Suitum's takings claim until she complies with the Ninth Circuit's requirement of seeking out a buyer for TRPA's administrative credits and applying for the agency's approval of their sale. Resp. Brf. at 18-19.

**1. Mrs. Suitum's Takings Claim Is Fit for Adjudication**

In *Abbott Laboratories*, the plaintiffs' claim was found to be fit for adjudication because there had been a "final agency action" under the APA.[9] This criterion is the equivalent, in a land use context, of *Williamson County's* requirement of a "final decision" concerning the extent and nature of development that will be permitted on the plaintiff's land.[10] In the case at bar, TRPA has conceded that it has reached a final decision within the meaning of *Williamson County*. Resp. Brf. at 31. Thus, Mrs. Suitum's takings claim is fit for adjudication under either *Williamson County* or *Abbott Laboratories*.

TRPA's "unfitness" argument rests entirely on its assertion that the value of its administrative credits is unknown and must be determined by Mrs. Suitum via a market transaction before trial. Resp. Brf. at 22-25. TRPA acknowledges there is no dispute concerning the precise nature and extent of the credits it requires Mrs. Suitum to market, but argues that "the lower courts never had an opportunity" to consider whether the credits could be valued like any other asset, through ordinary appraisal methods. Resp. Brf. at 30. This is a puzzling claim, given that TRPA filed a sworn affidavit with the trial court purporting to value the very credits at issue in this case via normal appraisal methods. App. 93-94, 123-32.

Apparently plagued by doubts concerning the reliability of its own affidavit, TRPA now suggests it would be "prudent" for a court to demand "more reliable evidence" in the form of a market transaction negotiated by Mrs. Suitum. Resp. Brf. at 31. Greater reliability is supposedly needed because TRPA's administrative credits are "a newly created property right" whose market is not yet

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[8] 387 U.S. at 149.

[9] *Id.*

[10] 473 U.S. at 190.



"fully developed and settled." *Id.* at 31, 29. However, this characterization is hard to reconcile with the brief submitted by TRPA's amici Pete Wilson, *et al.*, explaining to this Court that "a large and varied marketplace" for TRPA's credits has developed over the past ten years[11] and there is now an "active private market in place" for the credits.[12] This, of course, was TRPA's position in the trial court when it proffered an appraisal of the purported market value of its credits.[13] TRPA's contorted efforts to keep one foot planted firmly on each side of this issue culminate in its plea that, although Mrs. Suitum must be required to negotiate a market sale of TRPA's credits before she is allowed to bring her suit, the trial court must not be bound by such evidence, *but should assign whatever value to the credits it finds appropriate!* Resp. Brf. at 27 n.18.

Cutting through the obfuscation, this much is clear: TRPA's administrative credits *have* been valued by ordinary appraisal methods by *both* sides, and those differing valuations were before the trial court. App. 161-63. This reduces the issue to a factual dispute. TRPA's position, in essence, is that *the existence of a factual dispute should bar Mrs. Suitum from going to trial.* On the contrary, Mrs. Suitum contends that resolving such disputes is the quintessential function of trial courts in the Anglo-American legal system, and her claim against TRPA is fit for adjudication.

**2. Further Delaying the Adjudication of Her Takings Claim Would Impose Unconscionable Hardship on Mrs. Suitum**

TRPA and its amici contend that further delaying Mrs. Suitum's access to the courts will "impose[] no hardship" and work no "undue

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[11] Brief of Amici Curiae Pete Wilson, *et al.* (Wilson Brf.), at 15.

[12] *Id.* at 16.

[13] App. 146-48 (describing the multitude of market sales that have allegedly been entered in TRPA's "daily log" of TDR transactions). *See also* Resp. Brf. at 11 ("[m]any owners of SEZ property have successfully obtained and sold" TDRs).

burden" on Mrs. Suitum. Resp. Brf. at 28 n.19, 25.[14] This claim is hard to credence.

Mrs. Suitum is an elderly woman in frail health who has already suffered through seven years of administrative and judicial delays since TRPA flatly denied her right to build her dreamed-of retirement home in a residential subdivision of Incline Village.[15] TRPA's continual delaying tactics are supported by effectively unlimited governmental resources, while Mrs. Suitum is a retired widow of modest personal means. Each additional day that TRPA can keep Mrs. Suitum from litigating her claim on the merits increases the disparity between the parties, to the agency's advantage.

The "hardship" criterion in *Abbott Laboratories* included consideration of legal liabilities the plaintiffs might incur through a denial of preenforcement review of the regulations in question.[16] In this sense too, Mrs. Suitum faces substantial hardship if she is forced to negotiate the procedures required by the court below to "ripen" her takings claim.

Article VI(j)(4) of the Tahoe Regional Planning Compact provides:

> A legal action arising ... out of the granting or denial of any permit, shall be commenced within sixty days after final action by the Agency.[17]

TRPA's final action denying Mrs. Suitum's permit application occurred on November 29, 1990, exactly 60 days prior to the filing of her complaint. App. 8, 1. Among the procedures TRPA now requires Mrs. Suitum to negotiate is to obtain and market a

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[14] *See also* Brief for the United States at 26 n.13 (the hardship of postponing adjudication has "fallen largely on respondent").

[15] *See* Minute Order Denying Joint Motion to Dismiss for Failure to Provide Discovery, Court Record (CR) 60 (discovery process delayed because of Mrs. Suitum's "age and infirmity").

[16] 387 U.S. at 153-54.

[17] *See, e.g., Bourne v. Tahoe Regional Planning Agency*, 829 F. Supp. 1203, 1206 (D. Nev. 1993). Note that triggering this statute does *not* require a "final decision" within the meaning of *Williamson County*. TRPA does not dispute that it has denied Mrs. Suitum's permit application. *See* Answer to Complaint, App. 8.



"Residential Allocation" that is distributed via a lottery held only once a year. App. 146. TRPA admits that Mrs. Suitum's chances of winning the lottery are at most one in five (App. 146-47), but encourages her to return year after year until she succeeds. Resp. Brf. at 11 n.8.[18] TRPA also admits that in 1993, the last year for which data appear in the record, no one was able to sell any of the awarded allocations during their 12-month lifespan. App. 147. Mrs. Suitum respectfully suggests that if she were to follow the procedures TRPA has proposed--entering and re-entering an annual lottery as many times as necessary until she obtains an allocation; spending another 12 months unsuccessfully searching for a buyer; and finally refiling her takings claim incorporating this evidence that TRPA's credits are worthless--TRPA would immediately move for dismissal under the 60-day statute of limitations!

Even if TRPA's statute of limitations defense were deemed waived, Mrs. Suitum has explained how compliance with the "ripeness" requirements set forth by the court below could deprive her of standing to bring her takings and due process claims, or render those claims moot.[19] In response, TRPA suggests that this Court should not be concerned with these consequences, since the harsh procedural requirements imposed by the Ninth Circuit are unlikely to be applied to litigants other than Mrs. Suitum:

> In the context of TDRs, there is no rigid ripeness requirement of final TRPA approval, let alone a requirement of a final, consummated sale. Although the lower courts, in response to petitioner's extreme and unsubstantiated factual allegations, stated that ***her*** claim would not be ripe until she had obtained TRPA's approval, we do not read those courts as having held that TRPA approval would be required ***in all cases*** for prudential ripeness.

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[18] TRPA seems to believe the odds of winning are affected by whether a given player participated in the previous year's drawing. Resp. Brf. at 11 n.8. In fact, the odds of winning the annual lottery would never "approach 100 percent," but would always remain 1 in 5 so long as 30 entries compete for 6 allocations.

[19] Petitioner's Brief on the Merits at 27-29.

Resp. Brf. at 27-28 (emphasis added). The sense of this passage seems to be that special burdens were imposed on Mrs. Suitum because she refused to acknowledge TRPA's authority to require her to market its arguably worthless credits. Viewed in this light the hardships imposed on Mrs. Suitum by the decision below must be interpreted as *punitive*, levied in retaliation for her unqualified assertion of her fundamental constitutional rights; a more compliant victim would not be subjected to such harsh procedural bars. If TRPA is correct in this interpretation, this must surely be added to the balance of equitable considerations favoring reversal by this Court.

## II

## *PENN CENTRAL* DOES NOT SUPPORT TRPA'S ARGUMENT THAT MRS. SUITUM'S TAKINGS CLAIM IS NOT RIPE FOR ADJUDICATION

TRPA expresses astonishment that Mrs. Suitum has not discussed *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, a decision that has little or no relevance to the issues presented by her case. Indeed, to the extent *Penn Central* can be read to have any bearing on Mrs. Suitum's takings claim, it strongly supports her position with regard to both the ripeness of her claim and its merits.

### A. *Penn Central's* Takings Claim Was Not Barred on Ripeness Grounds

The most obvious distinction between *Penn Central* and the case at bar is that *Penn Central* was not decided on ripeness grounds. Despite the availability to the plaintiffs of unused and unvalued TDRs, Penn Central's taking claim was allowed to proceed on the merits. Thus, to the extent the availability of TDRs can be invoked to analogize *Penn Central* to the case at bar, the manner in which this Court resolved *Penn Central* supports Mrs. Suitum's argument that her case is ripe for adjudication on the merits.



### B. Ruling on the Merits, This Court Found No Taking Occurred in *Penn Central* Because New York City's Application of Its Landmarks Preservation Law Permitted the Owners to Continue to Make Profitable Use of Their Land, Did Not Interfere with the Owners' Primary Expectations, and Substantially Advanced Legitimate State Interests

The Landmarks Preservation Law at issue in *Penn Central* differed from TRPA's regulatory scheme in several key respects. This Court's ruling on the merits that no taking occurred in *Penn Central* rested precisely upon these distinctions, *not* on the single point of similarity--that New York City's regulatory program, like TRPA's, happened to include the use of TDRs.

At the outset, the plaintiffs in *Penn Central* conceded that New York City's application of its landmarks law did not preclude their ability to earn a "reasonable return" on the property in question by operating a railway terminal, concessions, and office space on the site.[20] As the Court noted, this established that the regulations at issue did not interfere with Penn Central's "primary expectation concerning the use of the parcel."[21] In cases where the application of the law would deprive an owner of significant beneficial use of his property, a special permit could be sought on grounds of "insufficient return;" however the *Penn Central* plaintiffs did not qualify for or utilize this hardship procedure.[22] The plaintiffs also acknowledged that the application of the law to their property, Grand Central Terminal, bore what would now be called an "essential nexus" to the achievement of the law's legitimate objectives.[23] These concessions by the *Penn Central* plaintiffs--reflecting as they do a completely different fact situation from that confronting Mrs. Suitum--effectively

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[20] 438 U.S. at 130.

[21] *Id.* at 136.

[22] *Id.* at 112, 118.

[23] *Id.* at 130. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 2312 (1994).

disposed of their takings claim regardless of any consideration of the role of TDRs.[24]

In the case at bar, by contrast, Mrs. Suitum is prohibited from making any beneficial use whatsoever of her land. App. 88. Her primary expectation--the right to build a personal residence on her residential subdivision lot--has been completely frustrated. App. 2, 88. TRPA's regulations provide for no hardship procedures, and in fact are predicated on the assumption that they will in every case deprive owners such as Mrs. Suitum of all beneficial use of their property. App. 26-27, 88-89. Finally, TRPA has not established through any sort of individualized determination that Mrs. Suitum's proposed construction of a single-family residence on her subdivision lot would have any effect whatsoever on the water clarity of Lake Tahoe.[25] These crucial distinctions suggest that, if the *Penn Central* Court heard Mrs. Suitum's claim on the merits, it would promptly determine that TRPA's actions have effected a regulatory taking. At a minimum, it is fair to say that *none* of the factors cited as relevant to takings liability in *Penn Central* would be found to favor TRPA in the present case.

### C. The *Penn Central* Court Specifically Noted That--Regardless of the Availability of TDRs--a Taking Would Be Found if the Regulation "Make[s] an Ordinary Building Lot Wholly Useless"

TRPA and its amici mischaracterize *Penn Central* as holding that the mere availability of TDRs insulates a regulatory scheme from a takings challenge, or at least extricates it from the per se, categorical takings analysis of *Lucas v. South Carolina Coastal Council*.[26] In fact, however, the majority opinion in *Penn Central* specifically cites to the following passage from *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908):

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[24] Respected constitutional commentators have observed that, because Penn Central admitted it was able to earn a reasonable return on its property irrespective of the availability of TDRs, the impact of the landmarks law "by definition could not rise to the level of a taking." Charles M. Haar and Jerold S. Kayden, LANDMARK JUSTICE 37 (1989). *Accord*, Daniel L. Mandelker, LAND USE LAW § 2.19 (1982).

[25] See *infra*, Section III.

[26] *E.g.*, Resp. Brf. at 33; Brief for the United States at 17.



> [T]he police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as ***to make an ordinary building lot wholly useless,*** the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.[27]

In the case at bar, TRPA's regulation of Mrs. Suitum's property has had precisely the effect of making "an ordinary building lot wholly useless." By citing the above passage in *Penn Central*, this Court anticipated *Lucas* by recognizing that such an extreme regulatory impact would constitute a per se, categorical taking *regardless* of the availability of TDRs.

Confirming this analysis, the majority opinion in *Penn Central* carefully noted that "nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal."[28] Had all construction activity been banned, as TRPA has done in the case at bar, a reasonable inference is that the *Penn Central* Court would have found a taking.

### D. Any Relevance of New York City's TDRs to the Merits of Penn Central's Taking Claim Stemmed from the Fact That Penn Central Could Make Use of the TDRs to Develop Its Own Property

TRPA and many of its amici misleadingly cite to a fragment of a sentence in *Penn Central* to the effect that, under the facts of that case, New York City's TDRs "undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation."[29] Interestingly, TRPA and its supporters excise the first clause of this sentence, in which the Court clearly signals that, if a taking *had* been found under the facts of *Penn Central*, the mere

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[27] *Id.* at 355 (emphasis added); *cited in Penn Central*, 438 U.S. at 128.

[28] 438 U.S. at 137 (emphasis in original).

[29] 438 U.S. at 137, *quoted in, e.g.*, Resp. Brf. at 33; Brief of the City of New York at 4.

availability of TDRs would not have saved the offending regulations.[30] Leaving that point aside, however, we must ask what the Court meant by saying the transfer of Penn Central's development rights could "mitigate" the economic burden of the landmarks law.

TRPA leaps to the conclusion that the cited sentence fragment means that "*the value of TDRs*" is "relevant to the question of whether a 'taking' has occurred in the first instance." Resp. Brf. at 33 (emphasis added). Similarly, the amicus brief for the United States argues that this fragment amounts to an "unequivocal holding" that the "existence *and value*" of TDRs must be considered in determining takings liability.[31] Neither TRPA nor its amici seem concerned that the cited passage does not mention *the value* of the TDRs at all.

The answer to this puzzle is found two sentences earlier in the opinion, where the Court notes that Penn Central's right to develop its property had not been extinguished; rather, the firm's development activity could be transferred

> to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.[32]

Does this mean, as TRPA contends, that Penn Central was required to scurry about, locate the owners of those eight buildings, and see how much could be realized from the sale of TDRs? Not at all. The key point is that ***Penn Central itself owned all eight of those buildings!***[33] The development the city would not permit over Grand Central Terminal could simply be shifted to another of the plaintiffs' properties in the same part of Manhattan. This is the "mitigation" to which the Court referred; in exchange for not placing an office tower over the Terminal, Penn Central would be allowed to exceed preexisting zoning restrictions for further development of the

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[30] The omitted text reads: "While these rights may well not have constituted 'just compensation' ***if a 'taking' had occurred*** ...." 438 U.S. at 137 (emphasis added).

[31] Brief for the United States at 17 (emphasis added).

[32] 438 U.S. at 137.

[33] *Id.* at 115.



Commodore Hotel, or other of its commercial real estate holdings! It is in this sense--and this sense only--that participating in the TDR program could be considered a "use" of Penn Central's property.

The equivalent "mitigation" in the case at bar would be a provision that, while Mrs. Suitum might not be allowed to build a house abutting the ditch at the rear of her property, she could instead build a larger one near the front of her lot, which would present no danger of increased sedimentation to Lake Tahoe.

That, of course, is not what TRPA has done. Nothing in *Penn Central* suggests that regulations that eliminate all beneficial use of residential property can be "mitigated" by throwing a handful of chits on the table and demanding that the victimized property owner attempt to find a buyer for them.

## III

## BUILDING A PRIVATE RESIDENCE ON A RESIDENTIAL SUBDIVISION LOT IS NOT AKIN TO A NUISANCE, AND IN FACT THERE HAS BEEN NO INDIVIDUALIZED DETERMINATION THAT MRS. SUITUM'S PLANNED CONSTRUCTION WOULD HAVE ANY ADVERSE ENVIRONMENTAL CONSEQUENCES WHATSOEVER

Even granting that Mrs. Suitum has been deprived of all beneficial use of her property, TRPA's amici argue that she nonetheless has no claim for a categorical taking under *Lucas* because her construction of a personal residence would be considered a "nuisance" subject to abatement under state law.[34] Mrs. Suitum's proposed construction of a retirement home, essentially identical to those already filling the Mill Creek Estates residential subdivision, is described as "a menace,"[35] "harmful to the health, morals, or safety

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[34] *E.g.*, Brief of the States, Nevada, *et al.*, at 11-17.

[35] *Id.* at 13.

of the public,"[36] "inflict[ing] injury upon the community,"[37] and "spread[ing] contamination."[38]

As a threshold matter, it is curious to note that these profoundly deleterious consequences would apparently accrue only to Mrs. Suitum's *private* development of her own property. *Governmental* development of the same land would seemingly be free of adverse environmental effects.[39] Even accepting the implied premise that only private development of Mrs. Suitum's lot would comprise a nuisance, however, this argument would prove too much. If Mrs. Suitum's construction of a single-family residence in the midst of a built-out subdivision would come under this Court's "nuisance exception" to the *Lucas* doctrine, then so would David Lucas' construction of two such homes under virtually identical circumstances. Because the *Lucas* exception did not apply to Mr. Lucas himself, it must be equally inapplicable to Mrs. Suitum.[40]

In any event, assertions that the construction of Mrs. Suitum's home would have adverse environmental impacts on Lake Tahoe are not supported by the record. The amicus brief of the State of Nevada, *et al.*, claims it is "undisputed" that there is a "causal relationship" between the construction of Mrs. Suitum's retirement home and "the pollution of Lake Tahoe's unique waters."[41] The brief of Pete Wilson, *et al.*, merely asserts that the "development of the petitioner's

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 18.

[39] According to TRPA's Code of Ordinances, land in a Stream Environment Zone will support no new *private* land coverage or permanent land disturbance whatsoever, but may be used for public recreation facilities or public service facilities. App. 26-27.

[40] On remand from this Court the Supreme Court of South Carolina found that no common law basis existed whereby the Coastal Council could "abate" the construction of David Lucas' home as a nuisance. *Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992). In its present amicus brief, the State of Nevada cites to no case or statute of that State under which building a personal residence in a residential subdivision has ever been found to comprise a nuisance.

[41] Brief of States, Nevada, *et al.*, at 17.



lot" would "seriously impair water quality.[42] Neither amici cite to any finding in the record supporting these claims.[43] Mrs. Suitum has disputed from the outset that TRPA's prohibition of her planned construction of a single-family residence on a flat lot in the midst of an established, built-out subdivision would substantially advance TRPA's regulatory objective of preserving the water clarity of Lake Tahoe.[44] At no time has TRPA made any individualized determination that the construction of Mrs. Suitum's home, employing appropriate technology and mitigation procedures, would cause so much as a single atom of nitrogen to tumble into the ditch 60 yards to the rear of her front property line and be borne thence to the lake.[45] Because there has been no such determination, the record in this case does not support assertions that the proposed construction of Mrs. Suitum's home would have any adverse environmental consequences at all--much less approach a common law nuisance.

## IV

## THE RECORD IN THIS CASE IS SUFFICIENT TO ESTABLISH A CATEGORICAL TAKING OF MRS. SUITUM'S PROPERTY UNDER *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*

The facts of this case are substantially identical to those of *Lucas v. South Carolina Coastal Council*, wherein this Court found a regulation that deprives an owner of all beneficial use of her land comprises a "categorical" or per se taking.[46] TRPA and its amici mischaracterize *Lucas* as requiring deprivation of "all economic

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[42] Wilson Brf. at 25.

[43] TRPA itself is more circumspect on this point, noting only that Mrs. Suitum does not deny that "development of SEZ properties," in general, could have adverse environmental impacts. Resp. Brf. at 45. Such a denial would of course amount to a *facial* challenge to TRPA's regulations, which is not raised by this litigation.

[44] Complaint, App. 4.

[45] TRPA has never found that Mrs. Suitum's proposed construction plans would cause any specific adverse impacts; instead, the agency's position is that development of property *like* Mrs. Suitum's is "*most likely* to result in significant degradation" of water clarity. Resp. Brf. at 5.

[46] 505 U.S. at 1018.

value" to establish a taking, and insist that "use" means "economic value" for purposes of applying the Takings Clause to the agency's prohibition of any beneficial use of Mrs. Suitum's land. Resp. Brf. at 34-36. Within this misguided framework, TRPA then argues that the monetary value of its administrative credits (if any) must be taken into account as a "use" of Mrs. Suitum's property in determining takings liability under *Lucas*. *Id.*

The categorical rule expressed in *Lucas* originated as the second prong of the two-part test for regulatory takings set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980):

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable ***use of his land***.[47]

This formulation has been frequently repeated in the same words, emphasizing that the takings inquiry focuses on the owner's ability to put the land to beneficial, productive *use*. This Court's references in *Lucas* to loss of "value" merely reflects the fact that the trial court in that case *had determined* that David Lucas' property was rendered "valueless." 505 U.S. at 1020. This Court has never *required* a showing of elimination of all value to trigger a categorical taking for the deprivation of all beneficial use of property.[48] Indeed, as was recently reaffirmed in *Youpee v. Babbitt*, ___ U.S. ___, 1997 WL 17839 (1997), takings liability can be incurred by the complete abrogation of any significant "strand" in the bundle of rights comprising ownership.[49] Elimination of all economic value would be

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[47] *Id.* at 260 (emphasis added; citations omitted).

[48] TRPA not only misreads *Lucas* itself but also misconstrues sources cited in the opinion. For example, TRPA puts a 20th Century accountant's gloss on Coke's famous maxim, "for what is the land but the profits thereof," Resp. Brf. at 35 n.24. However, Coke was discussing estates of land at 17th Century common law, in which context a "profit" signified a specific beneficial use of the land, *i.e.*, its employment in "vesture, herbage, trees, [or] mines." E. Coke, 1 Institutes of the Laws of England, ch.1, § 1(4)(g). An accurate contemporary paraphrase of Coke would therefore be, "for what is the land but the beneficial use thereof"?

[49] *Accord, Hodel v. Irving*, 481 U.S. 704, 716-17 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).



a special case of this general principle--a sufficient, but not a necessary, condition for a categorical taking.

Even a value-based takings inquiry, moreover, must be directed to the regulation's effect on the inherent utility of the land itself, *not* to the purported value of unrelated assets the state forces upon the landowner in the form of a coerced "exchange." As noted above, TRPA's claim that any resale value of its credits should offset the agency's liability for a taking rests entirely on a mistaken reading of *Penn Central*. Resp. Brf. at 32-33. Unlike the TDRs in that case, which actually facilitated more intensive development of the plaintiffs' real property than was otherwise possible under preexisting zoning,[50] TRPA's credits have no mitigating effect whatsoever upon the agency's outright prohibition of any beneficial use of Mrs. Suitum's property. Whether the credits in fact have economic value is for a trial court to determine. Regardless of the outcome of this factual inquiry, however, TRPA's administrative coupons cannot reasonably be described as a "remaining use" of a parcel of land that has been sterilized of its only inherent utility to Mrs. Suitum--serving as a locus for her personal residence.

The record in this case is sufficient to establish takings liability under *Lucas*, and the most appropriate disposition at this stage would be for this Court to so find and remand to determine whether TRPA wishes to limit its liability to damages for a *temporary* taking by allowing Mrs. Suitum to proceed with the construction of her retirement home.

## V

## THIS COURT SHOULD REJECT THE VIEW THAT PRIVATE OWNERSHIP RIGHTS ARE MERE PECUNIARY INTERESTS THAT CAN BE "REPLACED" BY BUREAUCRATIC FIAT WITHOUT TRIGGERING THE PROTECTIONS OF THE TAKINGS CLAUSE

The amicus brief of the City of New York correctly identifies the nature and importance of the underlying dispute before this Court

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[50] 438 U.S. at 137.

when it says, "[a]t issue in this case are two incompatible conceptions of real property."[51] Mrs. Suitum agrees with the city that

> [i]mplicit in petitioner's argument is the contention that the property she wishes to build on has a unique, intrinsic value to her for which any return is irrelevant.[52]

However, Mrs. Suitum disputes that this view of residential property ownership is "idiosyncratic."[53]

TRPA proudly asserts that its regulations have "replace[d] one property rights regime ... with another more suitable regime." Resp. Brf. at 38. This "more suitable" arrangement is one of bureaucratic command and control, where the "waste and inefficiency" of individual ownership rights are eliminated in favor of an omnipotent, centralized, regulatory directorate. *Id.* at 47. TRPA's self-proclaimed "replacement" (*i.e.*, nullification) of traditional Western concepts of ownership mirrors, at the macro level, its so-called "enhancement" of Mrs. Suitum's property by forcibly exchanging its credits for her right to a home on her own land. Resp. Brf. at 40-41. At both levels, TRPA's position relies on trivializing the values inherent in private property ownership in favor of a deficient concept of rights that is wholly reducible to pecuniary terms.

Thus, Mrs. Suitum's exercise of her personal autonomy and dominion by realizing her longtime dream of owning a retirement home on her own land is contemptuously dismissed as "secur[ing] economic return to herself"[54] or "reaping the financial rewards of land ownership."[55] TRPA acknowledges no injury from the loss of Mrs. Suitum's ownership rights *per se*, because it is the agency's position that property owners have no rights or interests under the Constitution that are not completely quantifiable and reducible to cash. Accordingly, Mrs. Suitum's prospective loss of her retirement home warrants no more than a cavalier aside: monetary compensation

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[51] Brief of Amicus Curiae City of New York at 14.

[52] *Id.* at 13.

[53] *Id.*

[54] Resp. Brf. at 36.

[55] Brief of Dr. James Nicholas, *et al.* (Nicholas Brf.), at 3.



"will be equally available in the future." Resp. Brf. at 26. Even if complying with the procedures demanded by the court below would result in permanently alienating Mrs. Suitum's right to build, she has no complaint, "any *economic injury* would remain." Resp. Brf. at 28 n.19

The *Lucas* majority recognized that the deprivation of all beneficial use of one's property is, "from the landowner's point of view, the equivalent of a physical appropriation."[56] This comparison highlights what the owner loses under regulations such as TRPA's: that measure of personal dominion and rightful autonomy that is the essence of property ownership. The fact that money damages may be awarded as the *remedy* for violations of constitutionally protected rights to life, liberty, and property does not imply that the rights themselves are merely pecuniary interests. TRPA's ham-fisted annihilation of Mrs. Suitum's right to the peaceful use and enjoyment of her retirement home diminishes her as a person. The agency's refusal or inability to recognize this fact provides a chilling illustration of the dehumanizing aspect of unrestrained statism.

Despite TRPA's assertion that its credits are "enhancements" to Mrs. Suitum's property because it has decreed them to be so,[57] these administrative contrivances were not part of the bundle of rights Mrs. Suitum acquired with her retirement homesite and did not enter into her reasonable expectations regarding the use of her property.[58] Under the Takings Clause, TRPA cannot simply "replace" Mrs. Suitum's rights with its bundle of credits, any more than it can "replace" a tradition of private ownership tracing back to Magna Carta with the "more suitable" framework of the TRPA Code of Ordinances.

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[56] 505 U.S. at 1017.

[57] Resp. Brf. at 23, 37, 40.

[58] The difficulty with TRPA's position is exemplified by the claim that Mrs. Suitum's reasonable expectations should be equated with $4,500 in cash, the amount she allegedly paid for her land. Brief Amicus Curiae of the League to Save Lake Tahoe at 18, 19, 27. In fact, however, Mrs. Suitum and her late husband acquired the Incline Village lot in exchange for a home in California that had previously been their personal residence. *See* Plaintiff's Answers to Interrogatories, Exhibit "A" to Opposition to Joint Motion to Dismiss, CR 52.

In TRPA's view, Mrs. Suitum's legitimate interests extend no farther than "preserving her investment in the area;"[59] her ownership rights reduce to nothing more than an "entitlement to an equitable share of the community's total development potential"[60]--which could of course be zero, if so proclaimed by a regulatory directive. This cramped and sterile notion of constitutional rights, which has informed all of TRPA's actions and decisions in its dealings with Mrs. Suitum, must be repudiated by this Court.

It may be true, as TRPA says, that the Constitution does not enact the theories of Friedrich Hayek,[61] but neither does it enact those of Friedrich Engels. TRPA has imposed enough suffering on Mrs. Suitum in pursuit of what it perceives as its regulatory mission. The agency's extinguishment of all beneficial use of Mrs. Suitum's property, evident from the record of this case as it now stands, effects a categorical regulatory taking under *Lucas* that is not only ripe but cries out for review.

## CONCLUSION

For all the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be REVERSED.

DATED: February, 1997.

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[59] Brief of the National League of Cities, *et al.*, at 25.

[60] Nicholas Brf. at 3.

[61] Resp. Brf. at 49.

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No. 96-243

# In the Supreme Court of the United States

OCTOBER TERM, 1996

BERNADINE SUITUM, PETITIONER

*v.*

TAHOE REGIONAL PLANNING AGENCY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner's Fifth Amendment "takings" challenge to certain land-use restrictions is ripe for adjudication.

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
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**BRIEF FOR THE**
**UNITED STATES AS AMICUS CURIAE**
**IN SUPPORT OF RESPONDENT**

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## INTEREST OF THE UNITED STATES

This case involves a claim that the development restrictions imposed by the Tahoe Regional Planning Agency (TRPA) on a particular parcel in a subdivision on the Nevada shore of Lake Tahoe resulted in a "taking" of property within the meaning of the Fifth Amendment. Numerous federal statutes and regulations also involve restrictions on the permissible uses of real property associated with environmentally sensitive areas. See, *e.g.*, 33 U.S.C. 1251 *et seq.* (Clean Water Act of 1977); 16 U.S.C. 1531 *et seq.* (Endangered Species Act of 1973); 30 U.S.C. 1201 *et seq.* (Surface Mining Control and Reclamation Act of 1977 (SMCRA)). Many of those regulatory frameworks include administrative procedures through which property

owners may seek exemption from, or modification of, applicable restrictions, and some provide for the transfer of development rights in order to mitigate the adverse effect of land-use controls, see, *e.g.*, 30 U.S.C. 1260(b)(5) (authorizing Secretary of the Interior to exchange federal coal deposits for deposits covered by SMCRA's prohibition on mining within or adjacent to alluvial valley floors). The United States therefore has an interest in the proper application of both the Takings Clause of the Fifth Amendment and the ripeness doctrine.

In addition, respondent in this case, the TRPA, was created by an interstate compact between California and Nevada that was approved by Congress "in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake." Act of Dec. 18, 1969, Pub. L. No. 91-148, § 1, 83 Stat. 360; Act of Dec. 19, 1980, Pub. L. No. 96-551, § 1, 94 Stat. 3233. Under the compact, the TRPA is empowered "to establish environmental threshold carrying capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent with such capacities." Pub. L. No. 96-551, § 1, Art. I(b), 94 Stat. 3234.

Under the Santini-Burton Act, Pub. L. No. 96-586, 94 Stat. 3381, the United States Forest Service is authorized to acquire lands and interests in lands in the Lake Tahoe Basin that are "environmentally sensitive." § 3(a)(1), 94 Stat. 3383. As of February 10, 1994, the Forest Service had acquired 3378 parcels (totalling approximately 11,000 acres) in the Basin, under the authority of the Santini-Burton Act. See General Accounting Office, *Report, Forest Service: Land Acquisitions Within the Lake Tahoe Basin* 2 (Oct. 1994). The Forest Service has acquired parcels in the subdivision in which petitioner's lot is located,



and in 1990 offered to purchase petitioner's lot (an offer which has lapsed).

## STATEMENT

1. Lake Tahoe, which straddles the California-Nevada border, is renowned for its scenic beauty and the extraordinary clarity of its water. Those qualities are both ecologically and economically important to the region, and are threatened by development in the surrounding basin. See *Kelly* v. *Tahoe Regional Planning Agency*, 855 P.2d 1027, 1028-1029 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994). In 1969, California and Nevada entered into the first Tahoe Regional Planning Compact in an effort to direct development in the Basin in such a manner as to protect and preserve the lake. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 393-394 (1979). The compact included findings that "the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region," and that "the region is experiencing problems of resource use and deficiencies of environmental control." Pub. L. No. 91-148, § 1, Art. I(a) and (b), 83 Stat. 360. In order to address those problems, the compact created the Tahoe Regional Planning Agency (TRPA), "an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development." Art. I(c), 83 Stat. 361. The TRPA was empowered to "adopt all necessary ordinances, rules, regulations and policies to effectuate" the Regional Plan. Art. VI(a), 83 Stat. 366.

The protections established under the 1969 compact proved insufficient to control the threat to the lake and its environs, and in 1980, a new compact was approved by Congress. The 1980 compact included the findings that

"[t]he region exhibits unique environmental and ecological values which are irreplaceable," and that "[i]ncreasing urbanization is threatening the ecological values of the region." Pub. L. No. 96-551, § 1, Art. I(a)(3) and (5), 94 Stat. 3233. The compact vested the TRPA with new authority to establish "environmental threshold carrying capacities"[1] and to adopt and enforce a regional plan and implementing regulations to achieve and maintain such capacities. Arts. I(b), V(b), 94 Stat. 3234, 3239.

In 1987, the TRPA adopted a new, comprehensive Regional Plan for implementing the 1980 compact. See *Kelly*, 855 P.2d at 1030-1031. The 1987 Regional Plan created the Individual Parcel Evaluation System (IPES), under which all undeveloped residential lots are evaluated and scored for their suitability for development. For each county in the Basin, the TRPA establishes annually a minimum score for eligibility for building. In 1989, the TRPA established an initial minimum IPES score of 725 to qualify for development. Properties with lower scores could not be developed. The minimum score is subject to revision, based in part on the particular county's efforts and success in achieving improvements to water quality in the Basin. See *ibid.*

The Regional Plan also identified Stream Environment Zones (SEZs) in the Basin, which are areas surrounding streams that carry run-off in the watershed into Lake Tahoe. A SEZ performs the critical environmental function of absorbing nutrients and cleansing the run-off, thereby maintaining the clarity of the lake. J.A. 22, 25.

[1] An "environmental threshold carrying capacity" is an "environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region." Art. II(i), 94 Stat. 3235. See *California* v. *Tahoe Regional Planning Agency*, 766 F.2d 1308, 1310 (9th Cir. 1985).



Because of the acute environmental sensitivity of such areas, the 1987 Regional Plan does not permit development in a SEZ that would result in permanent land disturbance or in covering the land with an impermeable surface. Parcels located in a SEZ therefore receive an IPES score of zero; with certain exceptions not relevant here, no construction can take place on such parcels. J.A. 26, 29, 62-68, 83, 87, 157-158.

The program imposed by the 1987 Regional Plan mitigates the effect of development restrictions on individual property owners by vesting in those owners certain transferable development rights (TDRs) that may be conveyed to owners of other eligible parcels. See J.A. 69-75. The Regional Plan recognizes three independent types of TDRs. A "residential development right" represents the right to have a residential unit on an eligible parcel of land. A "residential allocation" is necessary to construct a residence in a specific calendar year. "Land coverage" represents the right to utilize impervious coverage of land surface on one's parcel. J.A. 96-99. Each private owner of a vacant residential parcel automatically receives one residential development right, J.A. 97, whereas an owner's residential allocation and land coverage rights are determined through the TRPA's individual assessment of the parcel's suitability for development, J.A. 45, 70.

Owners of SEZ property receive both the standard allotment of TDRs and additional transferable property rights. In addition to the one residential development right that all private owners of vacant residential property possess, owners of SEZ property may earn and transfer up to three additional residential development units. J.A. 98. The owners of SEZ property also receive land coverage rights equal to 1% of the surface area of their land. J.A. 45, 62, 65. Finally, SEZ owners may apply for a residential allocation in any particular year and, if awarded an

allocation,[2] may transfer it for application to an eligible property in the Basin. J.A. 98-99, 146-148. While owners of SEZ property may not use their TDRs to develop the SEZ parcel itself, they may transfer those rights for use on any eligible property in the Lake Tahoe Region.[3] All such transfers must be approved by the TRPA, which reviews the eligibility of the receiving parcel under the development restrictions applicable to that parcel. J.A. 107-108.

2. In 1972, petitioner purchased a vacant lot in the Mill Creek Estates subdivision of Incline Village, located in Washoe County, Nevada. Her purchase occurred after the first Tahoe Regional Planning Compact was approved in 1969. Petitioner did not attempt to develop the property until 1989, after the adoption of the 1987 Regional Plan. At that time, petitioner entered the Washoe County drawing for a residential allocation and was awarded an allocation for that year. She then submitted building plans to the TRPA, seeking permission to construct a house on the lot. The TRPA denied permission to build because the lot was in a SEZ for Mill Creek, which flows into Lake Tahoe. The TRPA verified the status of the property by a field visit and confirmed that the property's IPES score was zero because of its location in a SEZ. Petitioner appealed the permit denial to the governing board of the TRPA, which denied the appeal on November 27, 1990. J.A. 14-15, 86-87, 158-159.

It is undisputed that, although petitioner could not build a house on her parcel, she was entitled under the 1987

[2] Residential allocations are awarded by local jurisdictions in random drawings. J.A. 99.

[3] Eligible property owners in the region who purchase such rights may then develop their parcels beyond the parcels' initial designations. For example, an individual who wishes to build more than one residential unit on his or her property would have to acquire additional residential development rights from other owners. J.A. 69-70, 158.



Regional Plan to transfer her residential development right and the right to cover 1% of her land (183 square feet) to other eligible properties. In addition, she was entitled to obtain and then transfer three bonus residential rights. Finally, although her 1989 residential allocation expired at the end of that year, she was entitled to enter the drawing again and, if successful, transfer that allocation. Petitioner did not again apply for a residential allocation, nor did she attempt to locate a buyer for her transferable development rights. J.A. 87, 158-159.

3. a. On January 28, 1991, petitioner initiated this action in the United States District Court for the District of Nevada against the TRPA, the States of California and Nevada, and Washoe County under 42 U.S.C. 1983.[4] She alleged that the restrictions enforced by the TRPA "de-n[ied] [her] the right to construct a home on the Subject Lot, thereby depriving her of all reasonable and economically viable use of the Subject Lot." J.A. 15 (¶ 6). She contended, *inter alia*, that the TRPA's actions constituted a taking of her property, in violation of the Fifth and Fourteenth Amendments. J.A. 16 (¶¶ 14, 16).

In its answer, the TRPA specifically denied petitioner's allegation that the challenged regulatory framework had deprived her property of all reasonable and economically viable use. J.A. 8. As an affirmative defense, the TRPA alleged, among other things, that "[petitioner's] complaint as to [the TRPA] is not ripe, and [the district court] thus lacks jurisdiction, because of [petitioner's] failure to obtain a final decision by TRPA as to the amount of development or other uses of [petitioner's] property that may be allowed by the Tahoe Regional Planning Compact and TRPA's Regional Plan and Ordinances." J.A. 10 (¶ 23).

[4] The complaint was subsequently dismissed as to all defendants except the TRPA. See District Court Docket Entry #24.

See also J.A. 11 (¶ 30) ("Each claim for relief of [petitioner's] complaint fails to present a concrete controversy ripe for adjudication.").

b. The parties filed cross-motions for summary judgment. With respect to petitioner's "takings" claim, the TRPA contended in support of its motion that petitioner's claim was not ripe for adjudication because petitioner "ha[d] failed to pursue transfer of development, a remedy geared *precisely* to those in her situation." TRPA's Memorandum of Points and Authorities in Support of Motion for Summary Judgment 19. Petitioner opposed the TRPA's motion on the ground that, having unsuccessfully appealed the TRPA's denial of her request to build, she "need do no more" in order to advance a ripe takings claim. Suitum's Opposition to Defendant's Motion for Summary Judgment 6. In her cross-motion, petitioner contended that "the TRPA's actions preventing [her] from building amount to such a denial of economically viable use as to constitute a taking." Suitum's Reply to Opposition to Plaintiff's Cross-Motion for Summary Judgment 1.

c. On November 23, 1993, the district court concluded that it could not resolve the ripeness issue without more information regarding the nature of petitioner's transferable development rights, the process for transferring those rights, and the value of the rights. J.A. 88-89. The court accordingly ordered the parties to file supplemental briefs "explaining what development rights can be transferred in [petitioner's] case and the procedures, prerequisites and value of such transfer as applicable in this case." J.A. 89.

In response to the court's order, the TRPA contended that "[t]he *actual* benefits of the [TDR] program for [petitioner's] property * * * can only be known if she pursues an appropriate application," and that, "[a]s a result, there is a measure of inevitable speculation in the



information" that it had submitted. J.A. 91. Nonetheless, the TRPA's submission included affidavits indicating that petitioner's TDRs were marketable and would have significant financial value if she sought to transfer them. J.A. 96-132; see also J.A. 91-93 (summarizing affidavits submitted by the TRPA).

In her supplemental brief, petitioner contended that pursuing the transfer of her development rights would be an "idle and futile act" because, in her view, the TDR program is "a sham." Suitum's Response to Defendant's Memorandum Concerning Its Transfer of Development Program 1-2. In so contending, however, she appeared to agree with the TRPA that the practical application of the TDR program to her property was "inevitabl[y] speculati[ve]." *Id.* at 2. In light of that ambiguity, and the prohibition of any physical development of her parcel, she asserted that the challenged regulations had reduced the value of her property "not to zero, but to a negative number." *Ibid.*

Petitioner included in her submission the affidavit of Paul Kaleta, a former employee of the TRPA. Mr. Kaleta agreed with the TRPA's submission "as it concerns identifying the *potential* available development commodities on the above referenced property," but disagreed as to the value of those rights. J.A. 135 (¶ 2). Mr. Kaleta expressed the view that "there is little to no value to these rights at the present time as there is either no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right." *Ibid.* (¶ 3).

d. Upon consideration of the parties' submissions, the district court dismissed petitioner's claims for lack of subject-matter jurisdiction, finding that they were not yet ripe for adjudication. J.A. 150-153. The court held, as a preliminary matter, that the affidavit of Paul Kaleta

submitted by petitioner was inadequate under Federal Rule of Civil Procedure 56(e)[5] and would be disregarded. J.A. 151 n.2. The court concluded that Mr. Kaleta demonstrated no "knowledge, skill, experience, training or education which would qualify him to testify as an expert [under Federal Rule of Evidence 702] as to the valuation of [petitioner's] development rights." *Ibid.*

The court next concluded that "transfer rights are significant to the takings calculus," J.A. 152 (citing, *e.g.*, *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 137 (1978)), and that the TRPA's TDR program was designed to mitigate the adverse effect of development restrictions on owners of parcels within SEZs, *ibid.* The court further found that "specific examples of sales of rights in the past demonstrate[] [that] there is significant value in the transfer of residential development rights and transfer of residential allocations which [petitioner] may be entitled to." *Ibid.*

The court next observed that, "until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated [petitioner's] reasonable expectations." J.A. 153. Because it concluded that an application to transfer development rights "is the only 'meaningful application' that can be made once property is determined to be SEZ," J.A. 152, the court held that petitioner was required to apply to the TRPA for approval of the transfer of her TDRs before her claim would become ripe, *ibid.* The court found that prerequisite to be consistent with this Court's requirement that property owners obtain a "final decision" as to the permissible uses of their property before proceeding to court. *Ibid.* (citing *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190-191 (1985); *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 348 (1986)).

[5] Rule 56(e) provides, in pertinent part:

> Supporting and opposition affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.



4. The court of appeals affirmed. J.A. 154-164. Observing that petitioner's takings claim is an "as applied" challenge (J.A. 159), the court held that, under the "final decision" requirement for ripeness set out in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, *supra*, petitioner was required to show that, before filing suit, she sought a "final decision from [the TRPA] regarding the application of the [challenged] regulation to the property at issue." J.A. 160 (citation omitted). Only in light of a final decision by the regulating authority, the court explained, may the economic impact of the challenged restrictions, and the extent to which they interfere with petitioner's investment-backed expectations, be judicially determined. J.A. 161.

The court rejected petitioner's claim that attempting to transfer her development rights would be futile because the TRPA's program was "a sham." J.A. 161. It held that the district court had not abused its discretion in rejecting Mr. Kaleta's affidavit, and affirmed the district court's finding that petitioner's "development rights possess some significant value." J.A. 163.

Finally, the court rejected petitioner's assertion that she need not pursue the transfer of her development rights because the TDR program was not designed to provide "just compensation." The court observed that regulatory requirements do not necessarily constitute a "taking" merely because their effect is to diminish the value of property. It held that, because application for approval of

the transfer of development rights under the instant program could "mitigate the regulations' economic effect and result in a diminution in value rather than a more severe economic impact," participation in that program was necessary to the consideration whether a taking had occurred at all. J.A. 163.

## SUMMARY OF ARGUMENT

I. Petitioner's central contention is that physical development of her property is the only "use" of that property that is relevant to the substantive "takings" analysis. That contention misapprehends this Court's takings jurisprudence, which, in turn, governs the proper application of ripeness principles to petitioner's claim. In *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), the Court expressly held that transferable development rights "undoubtedly mitigate whatever financial burdens the law has imposed on [property owners] and, for that reason, are to be taken into account in considering the impact of regulation." *Id.* at 137. Moreover, because the rights protected by the Takings Clause are primarily economic rights, petitioner's narrow focus on the physical development of her property is misplaced.

Contrary to petitioner's contention, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), supports the conclusion that the takings inquiry looks primarily to the economic impact of land-use regulations on the subject property. The outcome in *Lucas* turned on the lower courts' undisputed finding that the claimant's property had "been rendered valueless" by the challenged restriction. *Id.* at 1020. By contrast, the only admissible evidence in this case demonstrated that petitioner's property rights retain "significant value." J.A. 163.

II. Because transferable development rights (TDRs) are highly relevant to the substantive determination



whether a taking has occurred, property owners must obtain a final administrative determination as to the scope of those rights from the pertinent regulatory body before they can advance a ripe takings claim. Absent such a determination, courts cannot properly measure the economic impact of challenged land-use regulations, as this Court's takings decisions require. Petitioner appears to have satisfied the "final decision" requirement in this case by appealing the limitations on her parcel to the governing board of the TRPA. The scope of petitioner's TDRs was discernible under the 1987 Regional Plan as soon as her appeal of the TRPA's permit decision was denied.

Nonetheless, we believe that the procedural history and factual record in this case justified dismissal on prematurity grounds. The district court was faced with a circumstance in which both parties took the position that the value—as distinguished from the legal dimensions and permissible uses—of petitioner's TDRs was highly speculative in nature. Moreover, petitioner sought to challenge the bona fides of the TDR program without proffering any admissible proof and without taking any steps to market her transferable rights. Because of petitioner's total failure to substantiate her claim, the hardship of postponing decision apparently fell on respondent, which was urging lack of ripeness. In light of the unusual posture of the case, a finding of prematurity was justified under the prudential ripeness principles set out in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

## ARGUMENT

### I. PETITIONER'S PRINCIPAL RIPENESS CONTENTION IS PREMISED ON A FLAWED READING OF THIS COURT'S SUBSTANTIVE TAKINGS JURISPRUDENCE

Petitioner's principal contention is that physical development of her land is the only "use" of real property that is relevant to the determination whether a "taking" has occurred. In petitioner's view, the existence and value of transferable development rights are immaterial to the takings inquiry and, consequently, to the threshold question of ripeness. See, *e.g.*, Pet. Br. 13-15. That contention is directly contrary to this Court's decisions.

A. In *Penn Central Transportation. Co.* v. *City of New York*, 438 U.S. 104 (1978), property owners claimed that the New York City Landmarks Preservation Commission's refusal to allow them to construct a 50-story office tower over their existing structure (Grand Central Terminal) effected an uncompensated taking of their property. The regulatory framework at issue in that case imposed stringent restrictions on the subsequent development of properties designated as landmarks, but allowed affected owners to transfer certain development rights to other eligible parcels. *Id.* at 113-115.

The owners of the Terminal claimed, among other things, that the regulatory scheme had extinguished their "air rights" above the Terminal, and that that regulatory consequence constituted a taking of those rights. 438 U.S. at 136-137. In rejecting that contention, the Court made clear that transferable development rights constitute a "use" of property that is relevant to the takings analysis:

> [T]o the extent [that the owners of the Terminal] have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all use* of even those pre-existing air rights. Their ability to *use* these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable.



*Id.* at 137 (emphasis added in part; footnote omitted).

The Court in *Penn Central* also made clear that the existence and value of TDRs are primarily relevant to the question whether a taking has occurred at all, rather than merely to the question whether "just compensation" has been afforded. It explained that, "[w]hile these [transferable development] rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [the owners] and, for that reason, are to be taken into account in considering the impact of regulation." 438 U.S. at 137 (citing *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 n.3 (1962)). The Court then concluded that, on the record before it, "the application of New York City's Landmarks Law has not effected a 'taking' of [the Terminal owners'] property." *Id.* at 138.

*Penn Central* thus forecloses petitioner's argument that her TDRs—which the undisputed evidence demonstrated "possess some significant value" (J.A. 163)[6]—

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[6] Petitioner did not seek review by this Court of the court of appeals' upholding of the district court's ruling, pursuant to Federal Rule of Civil Procedure 56(e), that the affidavit of Mr. Kaleta, petitioner's putative expert, would not be considered. Accordingly, for

should not be considered in the determination whether the challenged regulatory restrictions effect a taking.[7] It is true that the overall impact of the challenged land-use restrictions in *Penn Central* may well have differed from that of the restrictions at issue here because more modest construction above the Terminal might have been possible, and because the landmark restrictions did not interfere with what the Court "regarded as [the property owners'] primary expectation concerning the use of the parcel"—its continuing use as a railroad terminal. 438 U.S. at 136. The possibility of such factual distinctions, however, suggests merely that the ultimate substantive determination whether the restrictions on petitioner's parcel constitute a taking would not squarely be controlled by *Penn Central*. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981) (takings inquiry "must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances"). Any such differences would not, however, distinguish *Penn*

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purposes of this Court's review, it is no longer contested that the operation of the TRPA's regulatory program leaves petitioner with real and substantial value as part of her ownership of the parcel.

[7] Indeed, the transferable rights at issue in this case are, in significant respects, more expansive than were those available to the Terminal owners in *Penn Central*. Compare *Penn Central*, 438 U.S. at 113-115, with J.A. 90-99, 144-149, 157-158. For example, the TDRs recognized in *Penn Central* could be transferred only to otherwise eligible properties across the street from the landmark parcel, across a street intersection, or "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership." 438 U.S. at 114. By contrast, the TDR program at issue here allows a transfer of rights to any otherwise eligible parcel within the Tahoe Basin and does not require coinciding ownership. J.A. 69-73.



*Central*'s unequivocal holding that the existence and value of transferable development rights "undoubtedly mitigate whatever financial burdens the law has imposed on [a property owner] and, for that reason, are to be taken into account in considering the impact of regulation." 438 U.S. at 137.

B. Indeed, the conclusion that TDRs are relevant to the takings analysis flows inevitably from the nature of that analysis. The determination whether a taking has occurred in a given case entails "ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 349 (1986) (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979)); see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 295. The value and nature of rights—including TDRs—that a property owner retains (or, as in this case, obtains) notwithstanding the regulation of his or her parcel are logically relevant to each of those factors. See, *e.g.*, *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property.") (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987)).

The Court's takings doctrine views an individual's interest in property as a "bundle of rights" that can be possessed, alienated, or regulated either as a whole or with respect to its constituent parts. See *Dolan* v. *City of Tigard*, 512 U.S. 374, 393 (1994) (characterizing right to exclude others from one's property as "one of the most essential sticks in the bundle of rights that are commonly

characterized as property") (quoting *Kaiser Aetna*, 444 U.S. at 176); see also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); *Hodel* v. *Irving*, 481 U.S. 704, 716 (1987); *Keystone*, 480 U.S. at 497. The ability physically to develop real property typically is within that bundle and plainly is one important "use" of an owner's land. But the recognized bundle of rights associated with ownership embraces many other "uses," including the right to exclude others from the property, the right to exploit its resources, the right to lease it, and the right to dispose of it (or aspects of it) through devise, gift, or sale. The question whether regulation of certain "sticks" in the bundle constitutes a taking of the whole requires a comprehensive, fact-intensive inquiry that rarely turns on the treatment of a single attribute of ownership.[8] Petitioner's contention (Br. 11, 19-22) that physical "development" of a

[8] The Court has identified only two categories of regulation that constitute *per se* takings—*i.e.*, that are "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first occurs where government action results in a permanent, physical occupation of property. *Ibid.*; see, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982). The second arises "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015 (citing, *e.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834 (1987)). Petitioner does not (nor could she) contend that a physical occupation of her land has occurred in this case. And, as we explain below, the undisputed evidence in the record refutes the proposition that the restrictions she challenges deny her all economically beneficial use of her property. Nor, under this Court's takings jurisprudence, can she "shoehorn" her claim into the latter category by dividing her parcel of property "into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe*, 508 U.S. at 643-644. Yet that is precisely what petitioner's principal contention seeks to do in this case.



parcel is the sole or determinative factor in the takings inquiry is therefore erroneous.

Petitioner's narrow focus on physical development is unavailing for an additional reason. The right protected by the Fifth Amendment's Takings Clause is fundamentally an economic right. See *Lucas*, 505 U.S. at 1017 ("[F]or what is the land but the profits thereof[?]") (quoting 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812)). The Clause does not prohibit all takings of property, but, rather, uncompensated takings. Thus, where there is no physical occupation of the owner's property,[9] the inquiry into whether a taking has occurred looks primarily to the challenged regulation's "*economic* impact" on the subject property, see, *e.g.*, *Kaiser Aetna*, 444 U.S. at 175; *Hodel* v. *Irving*, 481 U.S. at 714; *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986); *Keystone*, 480 U.S. at 495; *Concrete Pipe*, 508 U.S. at 645, not to whether an owner's preferred or most beneficial use has been hampered. *Penn Central*, 438 U.S. at 130 ("[T]he submission that [property owners] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."). Because the appropriate analysis turns on whether governmental restrictions "den[y] an owner *economically* viable use of his land," *Dolan*, 512 U.S. at 385 (quoting *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis added), courts must consider all financially productive uses, including those that do not entail physical development of the property.

[9] The Court has held that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432.

Contrary to petitioner's contention (Br. 30-34), the Court's decision in *Lucas* strongly supports that conclusion. There, the Court found a *per se* taking to have occurred, based on the undisputed factual finding that the claimant's property "ha[d] been rendered valueless" by the challenged land-use restriction. 505 U.S. at 1020. The Court was therefore faced with "the relatively rare situation[] where the government has deprived a landowner of all *economically* beneficial uses" of his or her property. *Id.* at 1018 (emphasis added). The Court made clear, moreover, that it was the *economic* impact of the challenged restriction in that case that rendered it unconstitutional. See, *e.g.*, *id.* at 1019 ("[W]hen the owner of real property has been called upon to sacrifice *all economically* beneficial uses in the name of the common good, that is, to leave his property *economically* idle, he has suffered a taking.") (emphasis added in part); *id.* at 1016 ("[T]he Fifth Amendment is violated when land-use regulation '* * * denies an owner *economically* viable use of his land.'") (quoting *Agins*, 447 U.S. at 260) (emphasis omitted in part).

*Lucas* therefore reaffirms that the ability to construct a building on one's land is but one of several important interests that are relevant to the takings inquiry. The present case, moreover, stands in stark contrast to *Lucas* because, here, the only admissible evidence established that petitioner's TDRs do possess meaningful value. Far from being a "contriv[ance]" or evasion of the Fifth Amendment, Pet. Br. 30, the TRPA's TDR program seeks reasonably to balance the strong public interest in ecological preservation against the property rights of private owners.[10]

[10] Seen in this light, the district court's grant of summary judgment in this case, while expressed in ripeness terms, effectively rejected petitioner's contentions as without merit insofar as they rested on a rationale of facial or *per se* invalidity of the TRPA's TDR program. To the extent that petitioner and her supporting *amici* argue that this Court should adopt a similar rationale, those arguments are foreclosed by this Court's takings jurisprudence and, specifically, by its holding in *Penn Central*.

Indeed, on its face, the TRPA's program seems a commendable effort to preserve both ecological and economic values in this peculiar geographic area in a way that achieves both reciprocity of advantage and a sharing of the economic burden. In light of the findings supporting the 1980 compact that enabled the plan's adoption (see pp. 3-4, *supra*), it would be unrealistic to assume that property values in the Basin would remain undiminished if effective steps were not taken to prevent serious environmental degradation. By imposing somewhat greater restrictions on development of non-SEZ properties than might otherwise be required for the parcels in isolation, the plan creates valuable TDRs for owners of SEZ parcels whose own development would threaten the community's ecology and economy. And the plan's overall protection of the area's interdependent ecological and economic values also helps to preserve residual resale value in the SEZ parcels. See J.A. 152.

Moreover, this Court's takings jurisprudence recognizes "that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation." *Lucas*, 505 U.S. at 1022. The peculiar dangers that would be posed by further impervious coverage of SEZ parcels therefore is relevant to the takings calculus here, even though the TRPA has not found it necessary to contend here that the restrictions imposed on further development of SEZ parcels would be permissible even in the absence of the countervailing enhancements of value created by the TDR program.



## II. THE COURT OF APPEALS' RIPENESS DETERMINATION WAS PERMISSIBLE IN THE CIRCUMSTANCES OF THIS CASE IN LIGHT OF PRUDENTIAL RIPENESS CONSIDERATIONS

In light of the foregoing, petitioner errs in contending that the TDR program, and the transferable development

rights that she possesses, are irrelevant to the determination whether her takings claim was ripe. Under the terms of the 1987 Regional Plan, however, it appears that petitioner satisfied the requirement of a final administrative determination when she appealed administratively the TRPA's designation of her parcel and its denial of permission to construct a house on her lot. See J.A. 158. Nonetheless, we believe that the procedural history and factual record in this case justified dismissal of petitioner's takings claim.

A. 1. In *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), the Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. In so holding, the Court applied traditional rules of justiciability to the substantive claim at issue. See *id.* at 190 ("Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause."). Reiterating that the crux of the takings inquiry is the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations, the Court explained in *Williamson County* that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191. The Court again applied the "final decision" requirement in *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986), explaining that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* at 348.



Because, as we have explained, the existence and value of transferable development rights are highly relevant to the substantive determination whether a taking has occurred, it follows *a fortiori* from *Williamson County* and *MacDonald, Sommer & Frates* that claimants must obtain a "final decision" regarding the scope of such rights from the pertinent regulatory body before a taking claim will be ripe for adjudication. "[A]gencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *MacDonald, Sommer & Frates*, 477 U.S. at 350. Absent a final determination with respect to the full "bundle of rights" that a property owner possesses, courts cannot properly apply the "careful assessment of the impact of the regulation" on the claimant's property rights, *Penn Central*, 438 U.S. at 136, that this Court's cases require.

2. The courts below reasoned that, "[w]ithout an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of [petitioner's] property." J.A. 160-161. See also J.A. 152 ("As things now stand, there is no final decision as to how [petitioner] will be allowed to use her property."). Under the 1987 Regional Plan, however, the existence and scope of petitioner's TDRs were readily discernible when her property was designated as within an SEZ. It is undisputed that, at that point, she was entitled to transfer her residential development right and 1% of her land coverage, and was entitled to obtain and then transfer up to three bonus residential rights. J.A. 158-159. Petitioner was further entitled to enter the drawing for a residential allocation and, if successful, transfer that allocation to an eligible parcel. J.A. 159. By appealing the TRPA's denial of her construction request, petitioner seems to have satisfied the requirement that the pertinent regulatory body

rule on the full extent of her development rights. The fact that petitioner has not yet *realized* the value of her TDRs—and that both sides view that value as "speculati[ve]," J.A. 91—does not mean that the legal scope of those rights has not been finally determined by the TRPA.

Petitioner thus has satisfied the "final decision" requirement, as applicable to the instant regulatory program. For the reasons set out below, however, we believe that the lower courts' finding of prematurity in this case is supported by prudential ripeness concerns.

B. This Court explained in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), that the ripeness of a claim turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. The "fitness" inquiry serves both constitutional and prudential concerns; it ensures that Article III's "Case or Controversy" requirement is satisfied by the temporal posture of the case, see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974), and effectuates prudential concerns pertaining to judicial administration and resources, as well as the rule against "unnecessary decision of constitutional issues," *ibid.* The "hardship" inquiry is wholly prudential in nature, looking to the equitable factors weighing for and against adjudication of a claim at any given time. See L. Tribe, *American Constitutional Law* § 3-10, at 78 (2d ed. 1988).

In this case, petitioner's claim meets the requirements of Article III. She has demonstrated a current, personal injury that is "fairly traceable to [respondent's] allegedly unlawful conduct" and is "likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). By obtaining a "final decision" as to the scope of her TDRs, moreover, petitioner has ensured "that concrete adverseness" on which Article III justiciability depends. *Baker* v. *Carr*, 339 U.S. 186, 204 (1962).



It also appears, however, that "subsequent events may sharpen the controversy or remove the need for decision of at least some aspects of the matter." Tribe, *supra*, § 3-10, at 78. For example, if petitioner seeks and obtains a potential buyer for her TDRs at a substantial price, and if the TRPA approves the transfer of those rights to the buyer, petitioner's putative takings claim might abate entirely. Conversely, if petitioner is unable to locate a suitable buyer, or if the TRPA rejects petitioner's application to transfer her rights to a particular parcel, the courts may consider petitioner's claim in a far more concrete context than the one that presently exists.[11]

Ordinarily, the existence of such contingencies would not justify dismissal on prudential ripeness grounds where the "final decision" requirement is met.[12] The proper course would be for the district court to adjudicate the claim on the merits.[13] In this case, however, the

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[11] We do not mean to suggest that the value of conferring TDR rights under an overall system in which such rights are shown to have substantial market value can be negated by a particular owner by a showing that she experienced what may be aberrational marketing difficulties.

[12] The Court explained in *Abbott Laboratories* that the prudential ripeness doctrine arises from the discretionary nature of injunctive and declaratory judgment remedies. 387 U.S. at 148. Petitioner's complaint in this case seeks legal as well as equitable remedies. See J.A. 16-17. But because the courts below found that the regulatory regime on its face preserved significant economic value for the categories of TDRs petitioner possesses—and because her damages claim was wholly unsubstantiated by admissible evidence in this case—the mere assertion of the damages claim should not control the prudential ripeness calculus.

[13] In light of the substantive taking principles that we have described in point I, *supra*, petitioner necessarily would have lost on the merits of her takings claim, in light of her complete failure of proof, J.A. 151 n.2, and the undisputed evidence that her TDRs have signifi-

district court was faced with an unusual circumstance in which (1) both parties contended that the value of petitioner's property rights under the TDR program was "inevitabl[y] speculati[ve]", J.A. 91; Suitum's Response to Defendant's Memorandum Concerning Its Transfer of Development Program 2; (2) petitioner proffered no admissible evidence with respect to the overall economic impact of the challenged restriction on the value of her property rights, J.A. 151 n.2; and (3) petitioner had made no attempt to market her TDRs. In those circumstances—and in light of petitioner's litigating strategy of resting entirely on a broad-based attack on the bona fides of the TDR program that the courts below correctly rejected[14]—it was not error for the district court to conclude that the con-

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cant financial value, J.A. 91-93, 96-132. Thus, the "hardship" (see p. 24, *supra*) of postponing adjudication in this case appears to have fallen largely on respondent, which contended in the courts below that the claim was not yet ripe for adjudication.

[14] "[R]ipeness decisions * * * may be affected by the way in which a litigant attempts to articulate a claimed right. An articulation that seems conjectural and uncertain may defeat present decision where a different articulation might persuade the court of the need to decide." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532.3, at 166 (1996 Supp.).

Despite the vituperative nature of petitioner's challenge, see, *e.g.*, Suitum's Response to Defendant's Memorandum Concerning Its Transfer of Development Program 1-2, she does not purport to pursue a "facial" challenge to the "mere enactment," *Keystone*, 480 U.S. at 494; *Agins*, 447 U.S. at 260, of the 1987 Regional Plan. See Pet. Br. 4. But see note 10, *supra*. Such a challenge would be ripe in the circumstances of this case, see *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983), but would necessarily fail on the merits because the Regional Plan substantially advances legitimate state interests in environmental conservation and does not, on its face, "den[y] an owner economically viable use of his land." *Agins*, 447 U.S. at 260; *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928).



troversy was not yet "appropriate for judicial determination." Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937) (per Hughes, C.J.).

Finally, although the judgment below may be upheld on prudential ripeness grounds, the lower courts' suggestion that petitioner may ripen her takings claim only by actually applying for approval of the transfer of her TDRs, see J.A. 153, 160-161, would, in our view, erect too rigid a requirement. In the takings context, the ripeness inquiry focuses on solidifying the economic uses toward which regulated property may be put, and on identifying a measurable impact of regulation on the value of the claimant's property rights. Thus, as we have indicated, if petitioner alleged—and, ultimately, demonstrated—that she had made good faith efforts to locate a buyer for her TDRs, but had not been successful, then her claim would be ripe (both constitutionally and prudentially), notwithstanding her failure to apply to transfer her TDRs.[15]

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[15] Such a showing would not, however, be dispositive of her substantive takings claim. Petitioner's unsuccessful attempt to sell her TDRs for a price that she deemed acceptable would be one factor in determining whether her property rights retained meaningful market value.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court, U.S.
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No. 96-243

In The
# Supreme Court of the United States
October Term, 1996

BERNADINE SUITUM,
*Petitioner,*

vs.

TAHOE REGIONAL PLANNING AGENCY,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* AMERICAN HOMEOWNERS FOUNDATION AMERICAN LAND RIGHTS ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF
AMERICAN LOGGERS SOLIDARITY
CITIZENS AGAINST REPRESSIVE ZONING
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, INC.
CREATIVE REAL ESTATE MAGAZINE
DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION
DEFENDERS OF PRIVATE RIGHTS
FARM CREDIT PROPERTY RIGHTS FOUNDATION
ENVIRONMENTAL CONSERVATION ORGANIZATION (ECO)
FRONTIERS OF FREEDOM
HEARTLAND INSTITUTE
HILL COUNTRY HERITAGE ASSOCIATION
HILL COUNTRY LANDOWNERS' COALITION
MAINE CONSERVATION RIGHTS INSTITUTE
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TEXAS JUSTICE FOUNDATION
and TRANS TEXAS HERITAGE ASSOCIATION
IN SUPPORT OF PETITIONER

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the granting of the potential to transfer one percent of the right to use a building lot (for which the owner has been denied all beneficial and productive use), renders the taking claim not ripe for adjudication?

2. Whether the Fifth Amendment's mandate of "just compensation" is satisfied by the granting of transfer development rights instead of monetary compensation?

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of Petitioner.

## IDENTITIES AND INTERESTS OF *AMICI CURIAE*

**Defenders of Property Rights** is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders of Property Rights engages in litigation across the county affecting the public interest and the private property rights of its membership to vigorously protect those rights considered essential by the framers of the Constitution.

**American Homeowners Foundation** (Arlington, VA) is a nonprofit educational and research organization serving the nation's sixty-five million homeowners. The Foundation's mission is to educate homeowners and prospective homeowners and to protect and advance home ownership.

**American Land Rights Association** (Battle Ground, WA) is a non-partisan grassroots coalition of farmers, ranchers, private property owners, rights holders, loggers, miners, and outdoor recreation advocates in or near federally managed areas or who are affected by federal land use or environmental laws and regulations.

**American Loggers Solidarity** (Forks, WA) is a broad-based, grassroots organization made up of individuals, small

businesses, corporations and elected officials at the city, county and state level in seven states.

**Citizens Against Repressive Zoning** (Haslett, MI) works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

**Citizens For Constitutional Property Rights, Inc.** (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees provided in the Bill of Rights.

**Creative Real Estate Magazine** (Rancho Santa Fe, CA) publishes "How-To Journal For Anyone Who Wants To Make Money in Real Estate," sold by subscription nationwide for over twenty-five years.

**Davis Mountains Trans-Pecos Heritage Association** (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas.

**Defenders of Private Rights** (Baker City, OR) is dedicated to the defense of private rights as envisioned by the Founding Fathers, and portrayed in the U.S. and Oregon Constitutions, as originally written.

**Farm Credit Property Rights Foundation** (Austin, TX) is a non-profit educational and research organization formed to further the efforts of protection of property rights through litigation and legislation. It promotes coordination among property rights groups to find common strategies to preserve Fifth Amendment guarantees as intended by the Founding Fathers.



**Environmental Conservation Organization (ECO)** (Hollow Rock, TN) represents more than 500 local, state, regional and national organizations that promote free-market alternatives to regulatory environmental protection.

**Frontiers of Freedom** (Arlington, VA) is a grassroots membership organization founded to promote the basic ideas of the Founding Fathers as articulated in the Constitution to ensure the maximum amount of freedom for every American.

**Heartland Institute** (Palatine, IL) is a nonprofit public policy research organization serving the nation's federal and state elected officials, journalists, Heartland Members and other opinion leaders.

**Hill Country Heritage Association** (Lampasas, TX) embraces the conservation of natural resources in conjunction with respect for individual property rights.

**Hill Country Landowners' Coalition** (Georgetown, TX) was organized in 1991 to oppose over-regulation of private property.

**Maine Conservation Rights Institute** (Lubec, ME) is dedicated to private property rights and private conservation, through education and research.

**National Association of Industrial and Office Properties** (Herndon, VA) is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and internationally. Its members include the nation's leading commercial real estate developers, and also architects, brokers,

master planners, engineers, property managers, banks, insurance companies, and other real estate financial groups.

**National Association of Manufacturers** (Washington, DC) is the nation's oldest and largest broad-based industrial trade association. Its 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ eighty-five percent of all manufacturing workers and produce eighty percent of the nation's manufactered goods. More than 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

**National Association of Reversionary Property Owners** (Issaquah, WA) is a nonprofit foundation whose major goal is to assist property owners to maintain their complete land ownership and resist government confiscation.

**National Center for Policy Analysis** (Dallas, TX) seeks to develop and promote private alternatives to government regulation and control, solving problems by relying on the strengths of the competitive, entrepreneurial private sector.

**National Coalition for Public Lands and Natural Resources** (Pueblo, CO) represents 23,000 grassroots activists across the country and advocates common sense environmentalism including the protection of private property rights.

**Northwest Legal Foundation** (Minot, ND) exists expressly for the purpose of protecting the rights of individuals, especially real property rights, against the invasion of those rights by governmental actions.



**Oregonians In Action Legal Center** (Tigard, OR) is a nonpartisan, nonprofit, public interest law center involved in litigation seeking to protect the constitutional rights of landowners and counter excessive land use regulation.

**People for the West! ACCORD Chapter** (Phoenix, AZ) is a grassroots organization created to support western communities against the overreaching hand of government.

**Putting People First** (Helena, MT) is a nonprofit organization of citizens who support a return to common sense in man's relationship with nature and civility among men.

**Take Back Arkansas, Inc.** (Fayetteville, AR) is a private property rights organization whose goal is to organize like-minded people at the grassroots level and provide information about property rights.

**Texas Justice Foundation** (San Antonio, TX) is a nonprofit, public interest, litigation foundation that seeks to protect individual rights, limit government to its appropriate role, and promote a better business climate in Texas.

**Trans Texas Heritage Association** (Alpine, TX) is a statewide organization dedicated to the protection of landowners rights. Its members collectively own over fifteen million acres of land in Texas and other states.

## STATEMENT OF THE CASE

In 1972, Petitioner Mrs. Bernadine Suitum and her late husband acquired an 18,300 square foot building lot in a developed, residential subdivision located in Incline Village, Nevada. In 1989, Petitioner submitted a building permit application with Respondent Tahoe Regional Planning Agency (TRPA) seeking permission to build a house on the lot. Respondent denied the building permit application because in 1987 Petitioner's land had been included in a "Stream Environment Zone" (SEZ).

The regional plan which prohibits any "new land coverage or other permanent land disturbance" a SEZ, rendered Petitioner's land ineligible for development. However, under the regional plan, owners of property in a SEZ are eligible through a lottery system for certain transferable development rights (TDR's). In the instant case, Petitioner is potentially eligible to transfer development rights of 183 square feet, subject to Respondent approval. But as the trial court concluded as to Petitioner's lot: "The Court understands that plaintiff may not develop or build on the parcel of land she owns and that no developmental rights may be transferred *to* the property at issue." Pet. App. at D3 (emphasis in original).

After exhausting her administrative remedies, Petitioner filed suit in the United States District Court for the District of Nevada, alleging Respondent had taken her property rights without payment of just compensation under



color of state law in violation of 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the United States Constitution.

The district court awarded summary judgment in favor of Respondent on the ground that the case was not ripe for adjudication because Petitioner had not attempted to transfer her development rights to which she may be eligible under the TDR program.

The court below affirmed the district court decision on the ground that a TDR is a "use" of property, and because that use had not been exercised, Petitioner's case was not ripe for review.

## SUMMARY OF ARGUMENT

In 1922, Justice Holmes wrote what turned out to be the prophetic warning regarding the government's seemingly insatiable appetite to acquire constitutionally protected property rights without payment of just compensation:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 394, 415 (1922).

The case at bar represents nothing less than the government's latest attempt to evade its constitutional duty to pay for the property that it has taken.

In 1992, this Court announced the principle that governs the issue posed in the instant case:

> When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

*Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030 (1992).

The instant case is exactly like the case presented for review in *Lucas*, with one exception. In both *Lucas* and the instant case, the government has precluded the property owner from building a house on an otherwise buildable lot; in this case, however, the government has also told Petitioner that she has the right to enter into a lottery process whereby she can potentially transfer a development right equal to one percent of the square footage of that lot to someone else's lot somewhere. Petitioner does not own another lot nor is she interested in trying to market the development rights to other owners with the hope that they can put together enough development rights to build a house on some other property.

The ability to transfer a percentage of development rights does not constitute a use of the subject property at all. Thus, the existence of transferable development rights (TDR's) in this case does not change the conclusion that Petitioner's property rights have been taken. The



promulgation of the "Stream Environment Zone" now means that Petitioner can make absolutely no beneficial or productive use of her building lot, a right which background principles of property law would otherwise dictate that she possess.

In light of the fact that a *per se* taking occurred in this case at the point at which Respondent told Petitioner that she could make no productive or beneficial use whatsoever of her building lot, the court below's holding that the case was not ripe for adjudication is simply untenable.[1] Indeed, as this Court explained in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), the reason for the rule that a claim for just compensation is not ripe for review until the property owner had obtained a "final decision" from the administrative agency is to ensure that the court can determine *"how the regulations will be applied to respondent's property." Id.* at 200 (emphasis added).

In short, the takings inquiry focuses on the land regulated and the associated ownership rights. In the instant case, there is no question that the regulated lot is off-limits to development due to its inclusion in the Stream Environment

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[1] The court below held that the damages claim for violation of the government's obligation to pay just compensation was not ripe for adjudication, explaining:

> We have previously noted that there are "two independent hurdles to the filing of a [regulatory] taking claim in federal court against a state or local government." . . . Only the first, known as the "final decision requirement," is at issue in this case and it requires Suitum to show that before filing suit, she sought a "final decision from [TRPA] regarding the application of the regulation to the property at issue."

Pet. App. at A-8.

into her ability to utilize *that lot* would render a different result. *First English,* 482 U.S. at 321 (holding that government may not avert just compensation requirement where a taking has already occurred).

Thus, just as this Court in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 137 (1978), held the takings claim ripe for adjudication even though the government had made the developable air rights transferable to the owners' other buildings in Manhattan, likewise this Court should hold the instant claim ripe for adjudication and reverse the decision below.

Finally, the granting of a TDR to another piece of property does not satisfy the constitutional requirement of just compensation. This Court has repeatedly held that "just compensation" means payment of money damages for the fair market value of any property that has been taken. The government could not offer the property owner just anything of value such as a car, stock options, or a seat on the city council.[2] Therefore attempts to foist off on an unwilling property owner so-called equivalents -- regardless of how potentially valuable -- of just compensation for property that has been taken fail to pass constitutional muster. At best, as the *Penn Central* Court explained:

> While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law had imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

*Id* at 137.

Thus, the court below not only failed to apprehend the reality of the facts of this case, but it simply missed the point of the clear constitutional mandate that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Indeed, Justice Brennan's dissent in *San Diego Gas & Elect.Co. v. City of San Diego*, 450 U.S. 621 (1981) well applies to the case at bar: "This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: Once there is a 'taking,' compensation *must* be awarded." *Id.* at 654 (emphasis in original).

## ARGUMENT

### I. Once It Is Clear That A Property Owner Has Been Denied All Beneficial and Productive Use of Property, Compensation Is Owed For The Taking, And The Taking Claim Is Ripe For Adjudication.

The court below erroneously concluded that because Petitioner may have the right to transfer one percent of the use of her lot to another lot, that her taking claim was not ripe for adjudication. However, in a ripeness inquiry in the context of a zoning regulation, this Court only looks at the uses regarding

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[2] Indeed, given the fact that Respondent asserts that the TDR's do have a market value, it should sell the rights and use the proceeds to pay Petitioner the just compensation to which she is constitutionally entitled.

the property in question -- not on future uses of other land which the owner may or may not acquire. *Penn Central*, 438 U.S. at 136. In the leading case in this area, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), the Court looked exclusively at the ability of the property owner to use the land for which zoning had been denied, not at other land he may or may not own:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of *the type and intensity of development legally permitted on the subject property*. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes ... Until a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations *to its property*, it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed . . .

*Id.* at 350 (emphasis added).

There is no question in this case regarding how far the SEZ regulations have gone. They have deprived Petitioner of all of her rights to make reasonable and beneficial use of her building lot. Pet. App. at D-3. Thus, under this Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a *per se* taking of Petitioner's property rights has occurred. Moreover, because Petitioner's property rights have been taken, Respondent is now obligated to pay just compensation for that taking. *First English Evangelical*



*Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 n. 10("Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time.").

The court below's holding would allow Respondent to evade its constitutional duty to pay just compensation through employment of the fiction that the right to potentially transfer one percent of the use of her building lot to another lot elsewhere is a "use" of the original lot.[3]

On its face, however, the ability to transfer development rights to another lot which Petitioner does not even own (and even if she did would not allow her to build a house because of the square footage she can potentially transfer) is not a use of the original lot. Rather, the holding below simply allows government -- through a TDR scheme -- to truncate the Fifth Amendment's guarantee of just compensation by employment of a fiction that a TDR is a "use" of the original lot.

Exactly a decade ago this Court faced a similar attempt by government to evade its constitutional duty to pay just compensation for the taking of private property. *First English* 482 U.S. 304 (1987). The state of California had argued in

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[3]We recognize that TRPA's regulatory scheme is unique and conclude within that scheme, transfer of development rights is a 'use' of SEZ property. . . . That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.
Pet. App. at A-19-10.

*First English* that the Fifth Amendment's just compensation clause was a mere condition upon the exercise of the power of eminent domain. By this logic, California sought to limit property owners' remedy for an uncompensated taking to invalidation of the offending statute. Thus, the California legal system simply defined away the just compensation remedy by declaring that there could be no uncompensated takings, only invalid regulations, thereby protecting and encouraging the proliferation of confiscatory zoning and land use regulation.

However, in *First English* this Court flatly rejected the "California rule," holding that the rule unconstitutionally truncated the Fifth Amendment right to a money remedy. *Id.* at 317. Most significantly, the Court reasoned that denying an owner compensation for all those years in which he held the property but was denied its full use would be a constitutionally inadequate remedy: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.

This Court's refusal to allow government to avoid its constitutional duty to pay just compensation for the property that it has taken by engaging in subsequent actions to 'undo' the taking have most recently been rejected by this Court in *Lucas*:

> Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront



> Management Act. That there is a discretionary "special permit" procedure by which he may regain -- for the future, at least -- beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.

*Lucas*, 505 U.S. 1003, 1012-13 (citations omitted).

Just as this Court refused to allow government to undo its taking by subsequent actions in *Lucas* and *First English*, so should this Court in the instant case refuse to allow Respondent to avoid its constitutional duty to pay for the property that it has taken by its TDR scheme regarding future property which Petitioner may or may not be eligible to acquire.

## II. The Fifth Amendment Mandate of "Just Compensation" Is Not Satisfied By The Granting of Transfer Development Rights.

This Court long ago held that just compensation for the taking of private property means payment of money damages:

> The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of

> the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner.

*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

In sharp contrast, this Court has never suggested, much less held, that TDR's can be forced on an unwilling property owner as a substitute for just compensation.[4] The Fifth Amendment itself contains no limitation or exception for its guarantee that when private property rights are taken for public use, just compensation must be paid to the owner. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

In *First English*, this court overruled the California line of cases that had disallowed damages incurred prior to the actual invalidation of a challenged ordinance. In so doing, this Court reaffirmed the basic proposition that "the [Fifth]

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[4] *Penn Central*, 438 U.S. 104 (1978), involved New York City's refusal to allow the property owner to construct an office building in excess of 50 stories atop one of the most historically significant buildings in the city -- Grand Central Station. Employing the well-known three-factor analysis, which entails analysis of the character of the government's action, economic impact of the regulation, and reasonable investment-backed expectations of the property owner, the Court reasoned that because Penn Central could still profit from ownership of the train terminal, and obtain a reasonable return on its investments, no taking had occurred. *Id.* at 136. In short, the posture of Petitioner's position vis-a-vis the offer of TDR's is in no way similar to that of the property owner in *Penn Central*. Moreover, the *Penn Central* Court had an independent basis for its conclusion that no taking had occurred, regardless of the fact that the TDR's may have offset the economic impact of the permit denial.



Amendment . . . is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" *Id.* at 315 *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)(emphasis in original). Thus, just as this Court flatly rejected the California rule that invalidation of a regulation that infringed private property rights could satisfy the just compensation requirement, so should this Court reject Respondent's attempt to circumvent the Constitution by use of TDR's.

Similarly, in *Jacobs v. United States*, 290 U.S. 13 (1933), this Court reviewed the constitutionality of a lower court's holding that interest was not recoverable on a property owner's claim for just compensation because the statute under which suit had been brought did not authorize the payment of interest. This Court rejected the lower court's conclusion that the constitutional rights to just compensation could be limited by statute:

> The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, "and no specific command to include interest is necessary when interest or its equivalent is part of such compensation." The owner is not limited to the value of the property at the time of the taking; he is "entitled to such addition as

> will produce the full equivalent of that value paid contemporaneously with the taking."

*Id.* at 16-17 (citation omitted).

By the same token, Petitioner in this case is also entitled to full compensation, not the inadequate grant of the potential to transfer one percent of the use of her property to someone else's lot. Although it may well be that the use of TDR's may be a legitimate way to offset the economic impact of the SEZ on Petitioner's property or a desirable way to obtain funds through the sale of such rights to pay Respondent's cost of paying damages for the taking, in no way can TDR's be seen as satisfying constitutionally required just compensation.

## CONCLUSION

For all of the foregoing reasons, *amici curiae* urge this Court to reverse the decision below.

Respectfully submitted,

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**In the**
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BERNADINE SUITUM,

*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent*.

**On Writ of Certiorari to the**
**United States Court of Appeals for the Ninth Circuit**

# *AMICUS CURIAE* BRIEF OF THE MAYHEWS, *ET AL.* AND SECTION 28 PARTNERSHIP, LTD. SUGGESTING REVERSAL

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## *AMICUS CURIAE* BRIEF OF THE MAYHEWS, *ET AL.* AND SECTION 28 PARTNERSHIP, LTD.

### INTERESTS OF AMICUS CURIAE

*Amicus curiae*, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, Sunnyvale Properties, Ltd., and Section 28 Partnership, Ltd. (hereinafter collectively referred to as, *"amicus curiae"*), are property owners in the States of Texas and Florida who are interested in the formulation of a clear ripeness standard in land use cases which will result in the predictable application of an unambiguous rule nationwide. The Mayhews and Section 28 have been embroiled in land use litigation for nine and three quarter and four years respectively involving inconsistent and highly unequitable application of the ripeness doctrine. Both the Petitioner, Bernadine Suitum, and the Respondent, Tahoe Regional Planning Agency, have granted their consent to the filing of this *amicus curiae* brief.

## STATEMENT OF CASE

In this case, a property owner's constitutional challenges to the application of land use regulations to her property were held not to be "ripe" even though the Tahoe Regional Planning Agency had reached a final determination that she would not be permitted to make any physical use of her property. In *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996), the Court of Appeals for the Ninth Circuit held that *all* of the Plaintiff's claims -- a regulatory taking claim, a due process claim and an equal protection claim -- were premature under the first prong of the ripeness standard formally enunciated in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

The basis for the Ninth Circuit's ruling was that the Plaintiff, Mrs. Suitum, had not sought authorization for transferable development rights ("TDRs") and thus the Defendant, the Tahoe Regional Planning Agency ("TRPA"), had not made the requisite "final decision" under the first prong of the *Hamilton Bank* ripeness test:

> Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form[] of relief ... which might abate the alleged taking." Without



> pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis.

*Suitum*, 80 F.3d at 362-63 (citations omitted). This Court granted Mrs. Suitum's Petition for Writ of Certiorari.

*Amicus curiae* respectfully submits that: 1) it is clear from the face of TRPA's regulations and the final decision of TRPA, that Mrs. Suitum will not be permitted by TRPA to make any physical use of her property itself; and 2) the amount or quantum of TDRs available to Mrs. Suitum is ascertainable from the face of the regulations themselves. The regulations do not permit any transfers to Mrs. Suitum's property; the only transfers which may occur are to properties other than the property which is the subject of the instant litigation.[1] Thus, just as Mrs. Suitum's rights with respect to the on-site use of her property are clear, so are the number or amount of TDRs Mrs. Suitum may utilize off-site.

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[1] *See* Petition for Writ of Certiorari at 6-8, and Appendix F which is attached to the Petition for Writ of Certiorari.

TRPA has made a final decision not to permit Mrs. Suitum any on-site development rights. This "final decision" is ascertainable from the plain language of TRPA's regulations, but Mrs. Suitum went further and gave TRPA another chance to consider whether any on-site use would be permitted through her submission of building plans which were rejected, as was a subsequent appeal. The existence of the potential off-site use of TDRs to mitigate Mrs. Suitum's inability to engage in any on-site use of her property -- or whether the TDR mechanism might be equated with "just compensation" -- is immaterial to the issue of whether there has been a final decision. In this case, TDRs are only relevant to a *trial court* determination of whether in fact Mrs. Suitum's property has been "taken," so as to require the payment of just compensation.

## SUMMARY OF ARGUMENT

*Amicus curiae* submits that this Court should reverse the Ninth Circuit's decision in *Suitum*, 80 F.3d 359. That is so because TRPA indisputably made a final decision regarding a meaningful application for the development of Mrs. Suitum's property -- namely, no on-site development would be permitted on her property, effectively sterilizing the property and requiring it to be kept in its "natural state," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992), which constituted a sufficient factual setting for constitutional adjudication -- a concrete controversy ripe for review.

Whether or not the possibility of using TDRs "off-site" in any way mitigated the onerous effect of the application of



TRPA's regulations to the Suitum property has nothing to do with concreteness of the controversy, but rather has to do with whether Mrs. Suitum can demonstrate as a matter of fact that she has been denied all economically viable use of her property. It may be that Mrs. Suitum is ill-advised to proceed in the face of the unresolved factual matter of the potential value of TDRs, just as the *Penn Central* petitioners were ill-advised to proceed with a takings challenge based on the denial of a single, "grandiose" plan of development:

> . . . [i]t simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal.

*Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 136-137 (1978).

But just as this Court had jurisdiction in *Penn Central*, *amicus curiae* submits that this Court and the lower courts have jurisdiction *sub judice* in this matter.

*Amicus curiae* submits that *Suitum*, 80 F.3d 359, and other lower federal and state cases make clear the need for a plain exposition of the ripeness standard in land use cases.

*Amicus curiae* respectfully submits that the ripeness doctrine is more than a matter of academic curiosity. In the United States, the concept of property exists, not as an abstraction, but as the "yield" of a tension between the individual freedom to own and use property and the inherent power of the government to regulate for the public health, safety and welfare. The constitutional framework for the tension between public and private interests in the use of private property, however, is not a simple bright line test:

> . . . this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

*Penn Central*, 438 U.S. at 124. How far is "too far" is determined by "the particular circumstances [in that] case" in what are "essentially ad hoc, factual inquiries," *Id.*, and it is in failing to provide an effective and efficient forum for these *ad hoc* determinations that the lower federal courts and many state courts' treatment of ripeness threatens the very existence of property rights.

Put plainly, "[r]ights, constitutional and otherwise, do not exist in a vacuum." *Carey v. Piphus*, 435 U.S. 247, 254



(1978). In the absence of efficient and effective judicial review of the application of land use regulations to individual parcels of land, property rights exist only at the whim of the regulator. If the ripeness doctrine can be used to shield local government planning and zoning actions from judicial review by requiring useless applications for development approval which are not economically viable or repeat applications on the hope that a less "grandiose" plan might find favor with the local authorities, then there are effectively no property "rights." Justice Holmes long ago warned that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The ripeness rulings of the lower federal courts and many state courts which require multiple applications for development approval and useless and futile acts should not be allowed to provide cover for this "natural tendency."

At its core, the ripeness doctrine is nothing more than a modern expression of the time-honored juridical rule requiring a concrete controversy as a predicate to constitutional adjudication:

> The difference between an abstract question and a "case or controversy" is one of degree . . . [t]he basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."

*Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297-298 (1979)(citations omitted).

In the hands of the lower federal courts and many state courts, however, the ripeness doctrine has been transmogrified into a Sisyphean endurance course of multiple applications for development permission and of useless and futile acts. Consequently, the application of local government land use regulations to individual parcels of land are immunized from judicial review for all but the wealthy and very patient. *Amicus curiae* submits that a careful reading of this Court's decisions make it clear that the ripeness doctrine is a simple standard intended to ensure a sufficiently factual setting for constitutional adjudication -- nothing more and nothing less.

*Amicus curiae* respectfully submits the following articulation of this Court's ripeness holdings for the Court's consideration and prays this Court confirm its contours and content:

1. As applied, economically beneficial use, justice and fairness and substantially advances takings, due process and equal protection challenges to land use regulations which have been in effect over a period of time are ripe when *a* final decision is made in regard to a meaningful application for development approval (*e.g., Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *Penn Central,* 438 U.S. 104); and

2. As applied, economically beneficial use, justice and fairness and substantially advances takings, due process



and equal protection challenges to newly enacted land use regulations are ripe:

1) automatically, if development rights are clear from regulations (*e.g., First English Evan. Luth. Church v. City of Los Angeles*, 482 U.S. 304 (1987); *Lucas*, 505 U.S. 1003); or

2) if development rights are not clear from the face of regulations (*e.g., Penn Central,* 438 U.S. 104; *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Hamilton Bank*, 473 U.S. 172; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986)):

a) when a local government makes *a* final decision in regard to *a* meaningful application for development approval (*e.g., Penn Central*, 438 U.S. 104; *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)); or

b) when a local government otherwise takes an authoritative position in regard to development rights (*e.g., San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981)); or

c) where the preponderance of the evidence demonstrates that it would be futile or "pointless" to apply for development approval. (*MacDonald*, 477 U.S. 340; *Lucas*, 505 U.S. 1003.)

Under this articulation of the Court's ripeness standard, the application and availability of TDRs is irrelevant to the question of ripeness. TRPA made a final decision in regard to a meaningful application for development approval and Mrs. Suitum's TDR rights are clear from the face of TRPA's regulations.

## ARGUMENT

## I.
## THE PRECEPTS OF THE SUPREME COURT'S RIPENESS DOCTRINE: REQUIREMENT OF A FINAL DECISION, NOT PRO FORMA MULTIPLE APPLICATIONS

*Amicus curiae* respectfully submits that a careful review of this Court's ripeness decisions reveals a consistent and reasonable standard for when a sufficient factual setting exists to support constitutional adjudication of as applied challenges to land use regulations. If the development rights appurtenant to a parcel of land are all clear from the face of the challenged regulations, then a constitutional challenge is ripe. If development rights under the challenged regulations are not clear, then a constitutional claim is not ripe until a final decision has been made by the appropriate agency in regard to a meaningful application for development approval, unless the permitted development rights are otherwise apparent or it is clear that an application for development approval would be a useless or futile act.



### A. Supreme Court Precedents

In the land use arena,[2] the origins of the ripeness doctrine are found in *Penn Central*, 483 U.S. 104, where the Supreme Court held that the fact that the City had denied one particularly "grandiose" plan of development did not necessarily mean that the City would not approve a less ambitious plan and that therefore it was not possible for the Court to find that the planning and zoning actions of the City had effected a taking under the Fifth and Fourteenth Amendments. Although this Court found that it was possible that the City might approve a less-grandiose plan, the Court did

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[2] *Amicus curiae* respectfully submits that the context in which the ripeness doctrine evolved is important. In the early 70's, the "taking issue" became the focal point of land use law -- if a regulation went "too far," was it invalid, or was it a taking which required compensation? Government lawyers, not surprisingly argued that declaratory and injunctive relief was the only relief should be available while property owners argued for just compensation. In a series of cases including *Penn Central*, 483 U.S. 104, *Agins*, 447 U.S. 51, *San Diego Gas*, 450 U.S. 621, *Hamilton Bank*, 473 U.S. 172, and *MacDonald*, 477 U.S. 340, the Supreme Court wrestled with the taking issue, however it was not until *First English*, 482 U.S. 302, that the Court finally held that the constitutional imperative for just compensation applies to a regulation which is adjudicated to go "too far." Although the taking issue debate took almost 15 years to resolve, it became increasingly apparent in the late 70's and early 80's that the Court would ultimately rule in favor of property rights and hold that just compensation was required for enforcement of an overly restrictive regulation. In the face of this challenge, governmental lawyers and special interest groups, promoting public planning and regulation of the private use of private property, tried to stave off a ruling by invoking the concrete controversy requirement defense which had helped to avoid a ruling on the merits of the taking issue in *Agins*, 447 U.S. 51. It was out of this attempt to "avoid" the merits at all cost that the ripeness doctrine emerged.

not dismiss the matter for want of subject matter jurisdiction because the property owner had only tendered one application. Instead the Court adjudicated the concrete controversy at hand -- whether the planning and zoning actions of the City had effected a taking -- and found in favor of the City.

The ripeness concept was next considered in a facial takings claim in *Agins*, 477 U.S. 255. In *Agins*, the City adopted a new set of zoning regulations which downzoned property with spectacular views of San Francisco Bay. The new zoning district allowed a range of densities of one to five units per acre, based on a complex set of performance standards.[3] A property owner sued, challenging the regulations as a taking and seeking just compensation under the Constitution of the United States.

Although "ripeness" was not directly raised in *Agins*, the Court's discussion of the issue presented established the germ which would ultimately give rise to the doctrine:

> The [California Supreme Court] did not consider whether the zoning ordinances would be unconstitutional if applied to prevent appellants from building five homes. *Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions.* Thus, the only

[3] *See generally*, Kendig, L., PERFORMANCE ZONING (American Planning Association 1978).



> question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

*Agins*, 477 U.S. at 260 (citations omitted)(emphasis added).

The next year, the Supreme Court heard *San Diego Gas*, 450 U.S. 621, but once again found itself unable to reach the merits of the taking issue because of deficiencies vis-a-vis federal jurisdiction -- the decision of the California court was determined not to be final. Importantly, *San Diego Gas* was "ripe" in terms of a concrete controversy even though no application for development approval had been submitted. In *San Diego Gas*, ripeness was grounded in the actions of the County which disclosed the County's authoritative position in regard to San Diego Gas' development rights.

Between *San Diego Gas*, 450 U.S. 621, and the next major Supreme Court encounter with the taking issue in *Hodel v. Irving*, 481 U.S. 704 (1987), the taking issue, suffused with a new dynamic in municipal litigation arising out of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978),[4] percolated through the district and circuit courts in cases like *Hernandez*, 643 F.2d 1188:

> . . . where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come

[4] In *Monell*, 436 U.S. 658, the Court held that a municipality was a person for purposes of the Civil Rights Act of 1871, 42 U.S.C.A. § 1983.

> to result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification, we conclude that a "taking" does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.

*Hernandez*, 643 F.2d at 1200.

In *Hodel*, 481 U.S. 704, an as applied constitutional challenge to section 207 of the Indian Land Consolidation Act was rejected as not being ripe because the application of the statutory regime at issue to individual parcels of land was not clear from the face of the statute and no applications for use authorization had been requested.

In 1985, the Supreme Court took up *Hamilton Bank*, 473 U.S. 172, where the Sixth Circuit had held that a local government decision to downzone a previously approved subdivision constituted a taking and awarded just compensation. This Court held that on the record before the Court, the taking issue was premature because of the unexplored possibility that the subdivision could be developed as previously approved:

> As the Court has made clear in several recent decisions, a claim that the application of



> government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

*Hamilton Bank*, 473 U.S. at 186. Simply put, the Court found that the taking issue was not yet a justiciable controversy because of the uncertainty as to the application of the County's planning and zoning regulations to the subdivision. Importantly, the key element of this Court's holding in *Hamilton Bank* was the fact that the application for development approval was not meaningful. That was so because the applicable subdivision regulations required that an applicant for subdivision approval secure all variances necessary for the proposed subdivision. The property owner's refusal to obtain required variances meant, as a matter of fact and law, that the application was not meaningful:

> Indeed, in a letter to the Commission written shortly before its June 18, 1981, meeting to consider the preliminary sketch, respondent took the position that it would not request variances from the Commission until after the Commission approved the proposed plat . . . The Commission's regulations clearly indicated that unless a developer applied for a variance in writing and upon notice to other property owners, "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." Thus, in the face of

> respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plan was equivalent to a final decision that no variances would be granted.

*Hamilton Bank*, 473 U.S. at 190.

The year after *Hamilton Bank*, 473 U.S. 172, this Court avoided the merits of the taking issue in *MacDonald*, 477 U.S. 40, by once again invoking the ripeness doctrine. In *MacDonald*, a property owner sought subdivision approval. The County denied the plat and the property owner sought just compensation in an inverse condemnation action. The California courts dismissed the action and the matter was presented to the Supreme Court by the property owner seeking determination of the merits of the taking issue. The Court once again demurred, however, on the grounds that the denial of a subdivision plat did not constitute a final decision as to the application of the County's planning and zoning regulations:

> Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed."



*MacDonald*, 477 U.S. at 349 (citations omitted). This Court's decision was based on a record which showed that the plat was denied because of deficiencies in the application and therefore was not a *meaningful* application; however, the conservation coalition claimed that the decision required multiple applications in order for a taking claim to be ripe.

In the years after *MacDonald*, the lower courts, at the insistence of besieged government lawyers, have advocated all manner of ripeness doctrine defenses to avoid the merits of the taking issue, even though the Supreme Court made it clear in 1987 that:

> . . . where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

*First English*, 482 U.S. at 321.

In *First English*, the constitutional challenge was ripe even though no application for development approval had been submitted. Ripeness was grounded on the facts that the challenged regulations were newly enacted and that the property owner's right to use its property was clear from the face of the regulations. Similarly in *Nollan*, 483 U.S. 825, decided during the same term, a takings challenge was ripe after a single decision in regard to one application for development approval.

One year later, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court found that a takings claim to a rent control ordinance was not ripe for as applied review because the actual application of the ordinance to an individual property was not clear from the face of the regulations and no application for approval had been submitted.

Then, in *Lucas*, 505 U.S. 1003, the state court found that the property owner's development rights were clear on the face of the challenged regulations and this Court held that the constitutional challenges were ripe for adjudication

Finally, in *Dolan*, 512 U.S. 374, a challenge to a development exaction was found to be ripe based on a final decision on a meaningful application for development approval.

**B. Multiple Applications or Applications for All Possible Uses Are Not Required, and the Futility Doctrine May Render Any Application "Pointless"**

In *Hamilton Bank*, the Court formally established the simple and succinct "final decision" ripeness test:

> . . . a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached *a* final decision regarding the application of the regulations to the property at issue.



*Hamilton Bank*, 473 U.S. at 186 (emphasis added). The *Hamilton Bank* Court concluded that a "final decision," under the particular facts of the case, required both a "plan for developing [the] property" and an application for a variance. *Hamilton Bank*, 473 U.S. at 187-88. The variance requirement in *Hamilton Bank* was based on the factual circumstances of that case wherein the regulations specifically noted that a variance was required *in addition to plat approval* to correct any deficiencies in the application. *Hamilton Bank*, 473 U.S. at 189 n.10 (quoting regulations). A variance was required because, based on the record before the Court, a variance could have resolved the minor size and configuration problems raised by the local government in denying the application. *See Hamilton Bank*, 473 U.S. at 193 (variance required to determine whether the landowner could "develop the subdivision in the manner [it] proposed"). No *per se* requirement of multiple applications or applications for every conceivable use was adopted by the Court.

Subsequent to its holding in *Hamilton Bank*, the Supreme Court found the just compensation taking claim in *MacDonald*, 477 U.S. 340, to be unripe. In *MacDonald*, the Court held that the County's rejection of a preliminary subdivision plan which it determined had failed to adequately deal with several infrastructure issues, was not a "meaningful application" and that the County's rejection did not constitute a "final decision." On the record in those proceedings, there was still a possibility that "valuable development" might be permitted. Importantly, zoning was not at issue in *MacDonald* -- only the layout of the project was subject to review. *MacDonald*, 477 U.S. at 351 and 353 n.8. Because the property owner's application, which was denominated "preliminary,"

was deficient in several respects, the Court determined that it was not "meaningful" and that there was no final decision as to what development would be permitted.

*MacDonald* did not hold, and neither has this Court ever held, that more than one application is required before a claim is ripe for review, just that "*a* meaningful" application must be submitted before the *Hamilton Bank* test will be satisfied. Both before and after *MacDonald*, the Supreme Court has uniformly held that "meaningful" means a valid application, something more than *no effort at all to comply with local regulations.*[5] Indeed, the Supreme Court specifically noted that the doctrine should not be used to work injustices:

> A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination.

*MacDonald*, 477 U.S. at 352 n.7. *MacDonald* is further limited by the fact that the Court specifically determined that *there were remaining economically viable uses available to the property.* *MacDonald*, 477 U.S. at 345, 351 and 352 n.8. Because of this conclusion, and the fact that the initial application was only preliminary and inadequate in several respects, the Court determined that there had been no final decision.

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[5] *Compare Agins*, 447 U.S. at 260, (no application whatsoever renders claims unripe) *with Lucas*, 505 U.S. at 1012 n.3 (no application required where application would be "pointless").



Finally, this Court has also made it clear that no application will be required where such application would be futile or "pointless," *Lucas*, 505 U.S. at 1012 n.3; or said another way, no application is required where the regulations are clear on their face as to what development will be allowed.

## II.
## TOWARDS A UNIFIED STATEMENT OF THE RIPENESS REQUIREMENT IN LAND USE CASES AND THE NINTH CIRCUIT'S DEPARTURE FROM THE RULE

*Amicus curiae* respectfully submits that the precedents of this Court's ripeness decisions in *Penn Central*, 438 U.S. 104, *Agins*, 447 U.S. 255, *San Diego Gas*, 450 U.S. 621, *Hamilton Bank*, 473 U.S. 172, *MacDonald*, 477 U.S. 340, *Hodel*, 452 U.S. 264, *First English* , 482 U.S. 304, *Nollan*, 483 U.S. 825, *Pennell*, 485 U.S. 1, *Lucas*, 505 U.S. 1003, and *Dolan*, 512 U.S. 374, make clear the Ninth Circuit's error in requiring Mrs. Suitum to pursue TDRs as a prerequisite to suit.

What emerges from careful examination of these Supreme Court ripeness cases is a relatively simple rule which may be restated as two general rules.

First, as was the case in *First English*, 482 U.S. 304 and *Lucas*, 505 U.S. 1003 (no use of property allowed pursuant to the terms of regulations themselves), a land use case will *automatically* be ripe for review where the development rights are clear from the regulations. The property owners' claims were ripe in *First English* and *Lucas* because it was clear from the face of the regulations -- even though there had been no

applications filed whatsoever in either case -- that no use would be permitted of either property. Similarly, Mrs. Suitum's claims are ripe for review because there is simply no ambiguity as to what TRPA's regulations allow Mrs. Suitum to do with her property: *nothing*.

Where the development rights are not clear from the regulations as was the case in, for example, *Penn Central*, 438 U.S. 104, *Agins*, 447 U.S. 255, *San Diego Gas*, 450 U.S. 621, *Hamilton Bank*, 473 U.S. 172 and *MacDonald*, 477 U.S. 340, the Supreme Court ripeness decisions establish three different alternatives which may ripen a land use claim. First, a claim may ripen where a local government makes *a* final decision in regard to a meaningful application for development approval. Once *a* final decision is made regarding *one* meaningful application, no more applications are required unless there is some deficiency in an application which might be corrected through, for example, a variance. There is not, and never has been, any requirement that a property owner apply for every conceivable use before a claim will ripen for review. *Penn Central*, 438 U.S. 104, is illustrative of this principle.

In *Penn Central*, 438 U.S. 104, a meaningful application was filed seeking approval of an office building above a train station. The case was determined ripe and no additional applications were required even though TDRs were available to the plaintiff. Instead, the Court found that the plaintiff had failed to demonstrate a taking and suggested that TDRs might be considered "mitigation" of the burdens imposed by the regulations in issue. *Penn Central*, 438 U.S. at 137 ("[t]he [TDRs] undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason,



are to be taken into account in consideration of the impact of the regulation"). Here too, Mrs. Suitum's case is ripe for review and the trier of fact will need to determine whether the existence of the TDRs provides an economically viable use or effective payment of compensation; however, an application to use the TDRs has no relevance in terms of whether there was a final decision. Finally, even though Mrs. Suitum's rights were clear from the regulations themselves, she made an additional, albeit legally unnecessary effort, in submitting plans to construct a residence on her property. In connection with Mrs. Suitum's meaningful application, TRPA determined that no development would be permitted on site because the property was within the Stream Environment Zone ("SEZ"). Mrs. Suitum even unsuccessfully appealed TRPA's decision. No more is necessary to state a ripe claim.

Where development rights are not clear from the regulations, a claim may also ripen where the government otherwise takes an authoritative position in regard to the development rights. For example, in *San Diego Gas*, 450 U.S. 621, the Supreme Court found that it did not have jurisdiction to review a California Supreme Court decision denying monetary compensation because a remand to the trial court made the decision non-final. However, had the Supreme Court exercised its jurisdiction, it is plain that there was a final decision -- an "otherwise authoritative position" -- regarding the property in issue. Specifically, the City of San Diego designated the entirety of the plaintiff's property as an "open-space area," *San Diego Gas*, 450 U.S. at 626, and proposed as part of its open-space plan to "acquire the property to preserve it as parkland," *Id.*, even going so far as unsuccessfully attempting to issue bonds for the acquisition. Similarly, Mrs.

Suitum's property has been designated in TRPA's 1987 Plan as ineligible for development and TRPA has officially declared the property as within the SEZ, an area in which no development is permitted. TRPA has otherwise taken an authoritative position in regard to Mrs. Suitum's development rights; *she has none*.

Finally, where development rights are unclear from the face of regulations, a claim may ripen where the preponderance of the evidence demonstrates that it would be futile to apply for development approval. The law abhors useless acts and admits where it is plain that an application for development approval will be futile, a constitutional challenge is ripe. Mrs. Suitum's application for TDRs is also futile and unnecessary; TRPA has taken a definitive position and both the amount and value of the TDRs are readily ascertainable.

What is needed is not a new rule of law, but a comprehensive articulation of existing, albeit scattered, law into one coherent standard. The following chart of Supreme Court opinions illustrates this already existing law, divided up into the following three categories: (1) rights clear from regulations (claims always ripe); one meaningful application (claims always ripe); or some other authoritative position (claims always ripe):



| Name of Case | Rights Clear from Regulations | One Meaningful Application | Other Authoritative Position | Ripe |
|---|---|---|---|---|
| *Penn Central*, 438 U.S. 104 (1978). | NO | YES | NO | YES |
| *Agins*, 447 U.S. 255 (1980). | NO | NO | NO | NO |
| *San Diego Gas*, 450 U.S. 621 (1981). | NO | NO | YES | YES |
| *Hamilton Bank*, 473 U.S. 172 (1985). | NO | NO | NO | NO |
| *MacDonald*, 477 U.S. 340 (1986). | NO | NO | NO | NO |
| *Hodel*, 452 U.S. 264 (1987). | NO | NO | NO | NO |
| *First English*, 482 U.S. 304 (1987). | YES | NO | NO | YES |
| *Nollan*, 483 U.S. 825 (1987). | NO | YES | NO | YES |
| *Pennell*, 485 U.S. 1 (1988). | NO | NO | NO | NO |
| *Lucas*, 505 U.S. 1003 (1992). | YES | NO | NO | YES |
| Dolan, 512 U.S. 374 (1994). | NO | YES | NO | YES |

## III.
## THE NINTH CIRCUIT ERRED IN REQUIRING MRS. SUITUM TO UTILIZE HER TRANSFERABLE DEVELOPMENT RIGHTS AS A PREREQUISITE TO SUIT

The Ninth Circuit incorrectly formulated a new ripeness test in requiring that Mrs. Suitum actually sell her TDRs in order to state ripe constitutional claims as the existence of TDRs, and the characterization of the TDRs by the Ninth Circuit as a potential "use," is irrelevant to the final decision first prong of the *Hamilton Bank*, 473 U.S. 172, ripeness test.

There can be no real dispute that: (1) TRPA made a final decision not to allow any on-site, economically viable use of Mrs. Suitum's property; and (2) Mrs. Suitum submitted a meaningful application to use her property in the form of building plans which led to TRPA's determination that the property was within the SEZ and could not developed. The existence of TDRs, and Mrs. Suitum's admitted failure to utilize those TDRs, are wholly irrelevant to the final determination analysis. In this sense, the Ninth Circuit's focus on TDRs as a "use," is misplaced.

As has already been discussed, there is no requirement that a putative plaintiff apply for each and every potential "use" of his property to state a ripe claim. All that is necessary for a claim to be ripe is *a* final decision by the regulatory authority. As may be the case with Mrs. Suitum, if there are remaining potential uses of the property -- and there has nonetheless been a final decision -- then the plaintiff will bear the burden of demonstrating, as the plaintiff would in any taking case, that



those uses do not provide an economically viable or beneficial use. TDRs may be a "use," or they may in some cases be so valuable as to constitute payment of just compensation; however, the classification of TDRs as a "use" is simply not pertinent to a reasoned or rational ripeness analysis.

The ripeness doctrine is not a rule of exhaustion, financial or otherwise. Mrs. Suitum should not be required, as a matter of sound law or fundamental fairness, to apply for every conceivable use to state a ripe claim.

## CONCLUSION

*Amicus curiae*, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, Sunnyvale Properties, Ltd., and Section 28 Partnership, Ltd., respectfully request that the Supreme Court reverse the Ninth Circuit's decision in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996) and remand for trial on the merits.

Mrs. Suitum may be unable to prove that TRPA has taken her property because of the TDRs, but their existence is irrelevant to the issue of whether there has been a final decision which is ripe for review. This case is patently ripe for review: TRPA has definitively and unequivocally determined that no development will be permitted on Mrs. Suitum's property and that decision is final and ripe for adjudication. Whether TDRs are properly considered a "use" or just compensation is only pertinent to the question of whether there has been a taking.

No property owner should be required to apply for every conceivable use of his property to state a ripe taking claim; all that is required is *a* final decision.

Respectfully submitted,

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## PROOF OF SERVICE

I, Charles L. Siemon, a member of the Supreme Court Bar, hereby certify that three copies of the foregoing *Amicus Curiae* Brief of the Mayhews, *et al.* and Section 28 Partnership, Ltd. Suggesting Reversal were served. Service was made on the following individuals by first class mail on November 27, 1996:

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In the

# Supreme Court of the United States

October Term, 1996

**BERNADINE SUITUM,**
*Petitioner,*
**v.**

**TAHOE REGIONAL PLANNING AGENCY,**
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER, BERNADINE SUITUM

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## BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER, BERNADINE SUITUM

### IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae **Tahoe-Sierra Preservation Council, Inc.**, is a non-profit membership corporation organized under the laws of the State of California for the purpose of representing the interests of its approximately 2000 members, each a Lake Tahoe Basin property or business owner, before the applicable regional, state, and local regulatory agencies, including the Respondent Tahoe Regional Planning Agency ("TRPA"). The Tahoe-Sierra Preservation Council is also the lead plaintiff, along with approximately 450 of its members who are also individual named-plaintiffs, in twin lawsuits now consolidated and pending in the U.S. District Court, District of Nevada, before the Honorable Edward C. Reed (Case No. CV-N-84-257 ECR) involving "takings claims" brought against the Respondent TRPA. Those pending cases have been before the Ninth Circuit Court of Appeals on three separate occasions, and include:

- ***TSPC I*** – ***Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency***, 911 F.2d 1331 (9th Cir. 1990), cert. den. 499 U.S. 943 (1991)

- ***TSPC II*** – ***Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency***, 938 F.2d 153 (9th Cir. 1991)

- ***TSPC III -- Tahoe-Sierra Preservation Council, Inc., et al., v. Tahoe Regional Planning Agency***, 34 F.3d 753 (9th Cir. 1994), cert. den. __U.S.__, 115 S. Ct. 1401 (1995)

The issues at stake in the instant lawsuit are also issues involved in the aforementioned litigation brought by the Amicus Curiae and currently pending against TRPA in the U.S. District Court in Reno, and are otherwise issues of vital concern to all affected private property owners in the Lake Tahoe Basin who are subject to the regulatory requirements of TRPA.* Accordingly, Amicus Curiae has a strong and direct interest in the proper resolution of these important Constitutional issues, given the impact of the regulatory provisions adopted by TRPA upon the Preservation Council's members and other property owners owning property within the Lake Tahoe Basin. It was also for that reason that Amicus Curiae deemed it appropriate to submit, with this Court's consent, an earlier Amicus brief in support of the Petition for Writ of Certiorari in this matter.

Written consent to file this brief has been granted by both counsel for the Petitioner and the Respondent, and has been lodged with the Clerk of this Court.

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* Counsel of Record for the Amicus Curiae is also counsel for the defendants in a case now pending before the U.S. District Court, Eastern District of California, in which issues directly involving those addressed in the instant case are being raised as a defense by TRPA. See ***Tahoe Regional Planning Agency v. Romolo and Helen Barbieri***, E.D. of Calif., No. CVS-94-1380 LKK. All proceedings in that matter have been stayed by the District Judge pending this Court's decision in the instant case.



## SUMMARY OF ARGUMENT

The Petitioner, Mrs. Bernadine Suitum, and her husband while he was alive, made what in hindsight was apparently a real blunder -- nearly 25 years ago they decided to purchase a small, vacant residential lot in a newly-developing residential subdivision in the North Lake Tahoe community of Incline Village, Nevada. Their intent was someday to build their dreamed-of retirement home on that lot. Then, in what now turns out to be another foolish mistake, they decided to sit tight and do nothing with their vacant lot for the next 15 years, while others built their homes on almost all of the neighboring lots in the subdivision, and while the surrounding area became extensively urbanized. Additionally, they also made the apparent mistake of selecting a lot that appeared to them to be easy to build upon -- virtually level, only a couple of pine trees (it had previously been logged), covered mostly with field grasses and willows, and bounded at the rear property line by a small man-altered watercourse -- a small stream known as Mill Creek which had been relocated into a newly-dug channel during the development of the subdivision.

Little did the Suitums know at the time they purchased their lot that a decade later the newly-reconstituted TRPA, motivated by a burst of environmental zeal and over the vigorous protests of hundreds of affected property owners, would declare such vacant homesite lots located near a watercourse to be environmentally sensitive Stream Environment Zones ("SEZs") because of their purported value in cleansing watercourses of the "nutrients" that were said by TRPA to contribute to the decline of Lake Tahoe's water ***clarity***. Thus, in the 1980s, based upon its newly-found environmental wisdom, TRPA simply imposed an outright ban on any further use or building on such vacant

SEZ residential lots including Mrs. Suitum's -- TRPA's presumably easily enforceable "fix" to the environmental problem it then perceived.

In doing so, TRPA totally disregarded the fact that Mrs. Suitum's lot is virtually the last remaining, privately-owned vacant lot in the now built-out and heavily urbanized area, nor did it do anything to address the fact that the watershed it purportedly was seeking to protect was already extensively altered, modified, and heavily disturbed by urbanization. Rather, TRPA placed the entire burden of "protecting" Lake Tahoe on those few property owners, including Mrs. Suitum, who had not yet built upon their homesites by simply banning outright any further construction on such vacant SEZ lots.

In ***Lucas v. South Carolina Coastal Council***, 505 U.S. 1003 (1992), this Court held that where a land use regulatory agency adopts a regulation prohibiting a private property owner from making ***all*** economically beneficial ***use*** of his or her private property in the name of the common good by banning any building or other structures on that property, a "categorical taking" has occurred triggering the Just Compensation requirements of the Fifth Amendment. The facts at issue in the instant case fit the *Lucas* categorical takings rule like a glove with one new twist.

To insulate itself from a "takings challenge", the Respondent TRPA -- more particularly its highly-capable Self-Defense Experts -- simply appended to TRPA's SEZ building prohibition a post-takings "Transferable Development Rights" ("TDR") scheme by which Mrs. Suitum could theoretically recoup a small portion of the lost ***value*** of her valuable property by supposedly selling to another private party certain so-called "transferable rights" bestowed on her by TRPA after it prohibited all use of her property. When challenged in federal court, TRPA's Self-Defense Experts then, as expected, asserted that Mrs. Suitum



first had to navigate through TRPA's labyrinthian new TDR maze to try to determine whether in fact she could find anyone who was willing to pay her some amount of money for the redeemable TDR chits. They contended that until she did so, Mrs. Suitum takings claim was not "ripe" for judicial review.

Unfortunately, both the District Court and the Ninth Circuit fell for this ploy. Muddling the concept of potential post-takings ***recoupment of partial lost value*** with the ***denial of all use*** upon the adoption by TRPA of its SEZ building prohibition, the lower courts effectively created a gaping new hole in the *Lucas* categorical takings rule by requiring Mrs. Suitum to fully exhaust this agency-created, highly-speculative, post-takings TDR scheme before her takings claim was deemed judicially "ripe" -- a seemingly insurmountable new barrier effectively barring the courthouse doors to Mrs. Suitum.

On closer examination, it is clear that TRPA's Self-Defense TDR gimmick has nothing whatsoever to do with any ***use*** that Mrs. Suitum could make of her own property, nor with any rights granted to her to transfer any potential ***use*** to another property she owns, as she owns no other property in the area. At best, TRPA's TDR scheme simply provides her with a "redeemable voucher" that may or may not allow her to recoup some meager post-takings ***dollars*** to try to ameliorate her loss. Thus, seen in its best light, it goes only to the issue of the Just Compensation to which Mrs. Suitum is entitled -- a factual determination for the trier of fact when the matter of Just Compensation is addressed at trial, not an issue that can be properly resolved by way of summary judgment nor one having anything to do with the "ripeness" of her takings claim.

## ARGUMENT

## I

## NO MORE GRAPHIC EXAMPLE OF THE NEED TO INVOKE THE PROTECTIONS OF THE FIFTH AMENDMENT CAN BE IMAGINED THAN THE DECISION OF TRPA TO REQUIRE MRS. SUITUM TO SACRIFICE *ALL USE* OF HER RESIDENTIAL PARCEL IN THE NAME OF PROTECTION OF LAKE TAHOE, VIRTUALLY THE LAST REMAINING VACANT HOMESITE PARCEL IN A NEARLY BUILT-OUT AND HEAVILY URBANIZED AREA.

### A. The Regulatory Background:

There can hardly be any question about it -- TRPA certainly has earned the much-coveted Blackbelt for its demonstrated expertise in the specialized regulatory art of Takings Self-Defense. A recognized pacesetter whose bold and seemingly no-holds-barred approach has earned it the acclaim of its bureaucratic brethren, TRPA is today nearly without equals in its efforts to immunize its seemingly confiscatory land use regulations from the usual judicial scrutiny afforded to such measures.

One need hardly look any further than the facts and circumstances of this case for a more graphic example of how the extraordinary regulatory zeal of a land use regulatory agency has apparently blinded it to its equally important obligation to treat those it regulates in a Constitutionally permissible and fair manner.

The saga began in the early 1980s when the newly-reconstituted TRPA, concerned about scientific reports



showing a decline in the water *clarity* of Lake Tahoe,[1] determined that that decline was due in significant part to man-caused soil disturbance in scores of recently-urbanized sub-watersheds that surround Lake Tahoe . . . disturbances such as highways, road cuts and fills, large commercial and public projects, new subdivisions, and similar construction activities that TRPA concluded were "releasing nutrients" in the watersheds (nitrogen and phosphorus in the soils), which in turn are carried down to the Lake by seasonal run-off through the numerous watercourses feeding Lake Tahoe. Those additional soil nutrients, TRPA said, provide extra nourishment for the microscopic free-floating algae naturally found in the Lake, thus causing more microscopic algae growth which in turn reduces the clarity of the Lake's waters.

Thus, beginning in the early 1980s and continuing to the present, TRPA, over the vigorous protests of thousands of impacted private property owners who purchased legally-created homesites in existing residential subdivisions on which someday to build their retirement or vacation home, adopted an increasingly more Byzantine set of regulatory requirements that were purportedly aimed at trying to address the issue of the apparent increase in nutrients reaching Lake Tahoe.

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[1] The issue, unfortunately, is frequently mischaracterized as a "water quality" issue suggestive of a health and safety concern, when that of course is not the case. The waters in Lake Tahoe continue to be extraordinarily clean, clear and pristine -- cleaner and safer than almost all domestic drinking water anywhere in the country. The real issue is visual ***clarity*** -- how deep the human eye can see into the waters of the Lake as measured by the depth at which a 9-inch white disk lowered from a boat near the center of the Lake is seen to disappear from sight.

Pursuant to TRPA's 1987 Regional Plan at issue here, the key components of its adopted regulatory approach were to limit the number of newly-constructed homes in the Lake Tahoe Basin to 300 per year out of literally thousands of eligible vacant parcels; to ban all new lot-and-block residential subdivisions; to require compliance with strict building requirements known as "Best Management Practices" in the construction of the homes it allowed to be built so as to avoid erosion runoff; and to evaluate, score, and rank all existing vacant single-family parcels in the Basin through a highly-complex new Individual Parcel Evaluation System ("IPES"), with those receiving the lower scores being virtually precluded from ever building. As to certain lots or parcels found to be in areas TRPA euphemistically labelled as "Stream Environment Zones" -- now commonly referred to as "SEZs" -- it earmarked those properties as the most "environmentally sensitive" requiring the most "heightened protection" . . . regulatoryeze for justifying a blanket ban on any further "soils disturbance" -- building -- on those SEZ lots, including the lot owned by Mrs. Suitum.

Thus, with the magic stroke of its regulatory pen, TRPA not only coined the lofty-sounding label "Stream Environment Zone", but proceeded to define that term extremely broadly to encompass the watercourse itself and the adjacent banks and floodplain, as well as all of the nearby lands that showed any indication of subsurface wetness or high groundwater evidenced by the nature of the vegetation and soils.[2] That SEZ concept in turn became a

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[2] The precise definition of "SEZs" is set forth in TRPA's Code of Ordinances at Chapters 2 and 37.3, and is too lengthy and complex to set forth here in full. It involves a number of technical indicators by which the outer boundaries of a SEZ are determined and then mapped. Once mapped, TRPA's 1987 Regional Plan, at Goal 1, Policy 5.A. of the Conservation Element, and Ordinance Section 20.4,



central building block of TRPA's aggressive new regulatory program.

Having decided to ban all new development in areas it designated as SEZs TRPA next proceeded to map and field-verify the boundaries of thousands of acres of SEZs throughout the literally dozens of sub-watersheds that comprise the Lake Tahoe Basin, and then to overlay the current parcel ownership maps to identify those parcels of lands that were reportedly within SEZs.

Having "mapped" those SEZs, and having overlayed the property ownership boundaries, TRPA imposed a series of broad-sweeping regulatory restrictions that, cutting to the chase, prohibit outright all new land coverage[3], permanent land disturbance, or any other development within such mapped SEZs, particularly on privately-owned, vacant residential lots lying within SEZs such as that owned by Mrs. Suitum, with only very limited exceptions applicable to public outdoor recreation projects and certain other public facilities.

As applied to Mrs. Suitum's property, one of literally hundreds of similarly-situated SEZ vacant homesites, TRPA, at page 2 of its Brief in Opposition to the Petition for Writ of Certiorari, summarized its decision-making process and the consequences thereof as follows:

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expressly prohibit "any new land coverage or permanent land disturbance" in a SEZ area.

[3] "Land Coverage" is defined in Chapter 2 of TRPA's Code of Ordinances as a "man-made structure, improvement, or covering that prevents normal precipitation from directly reaching the surface of the land", such as buildings, decks, driveways, sidewalks, patios, and similar hard surfaces.

Mrs. Suitum's property is classified by TRPA as being located within a Stream Environment Zone [SEZ], which is a classification established by TRPA based upon the environmental sensitivity of the parcel. An (sic) SEZ generally conveys surface water from upland areas into Lake Tahoe and its tributaries. The role of an (sic) SEZ in the cleansing of run-off is integral to the preservation of Lake Tahoe's water clarity. Lake Tahoe is universally acclaimed as a national treasure. The riparian vegetation of an (sic) SEZ is important for many reasons, including treatment of runoff and maintenance of soil stability.

> **The classification of Mrs. Suitum's parcel as an (sic) SEZ prohibits construction of a new single family dwelling thereon.** [Citations omitted; emphasis added.]

To the regulators at TRPA, it was simple and straightforward. SEZs are "environmentally sensitive" areas that help cleanse run-off, thus helping preserve the water clarity of Lake Tahoe, a "national treasure". Mrs. Suitum's lot was found to be within such a SEZ. Thus she must be made subject to regulations that "prohibit construction of a new single family dwelling thereon," or for that matter, any other *use* whatsoever of her vacant lot.

And apparently to underscore how strictly it intended this SEZ prohibition to be applied, the TRPA-adopted regulatory program left no discretion to the TRPA staff regulators on individual project applications, nor did it provide literally hundreds of affected private property owners, including Mrs. Suitum, with any meaningful options. They were simply prohibited by TRPA from using their property for any viable purpose, once it was found to fall



within a TRPA-mapped SEZ. Conspicuously absent was any variance procedure to allow individual property owners to demonstrate that given the special circumstances of their property, or its location or unique configuration, it was virtually impossible for any construction on their lot to cause "soil nutrients" to enter Lake Tahoe. Nor did the regulations allow a property owner to demonstrate how and in what manner they could safely build so as to meet strict standards intended to prevent erosion, nutrient run-off, or other adverse impacts to the Lake. There simply were and are no exceptions.

### B. Mrs. Suitum's Vacant Homesite & The Surrounding Urbanized Area

Perhaps best illustrating the ill-conceived consequences of TRPA's blinders-on approach are the circumstances of Mrs. Suitum's case -- facts that are a matter of public record and will undoubtedly be put forward to the trier of fact if and when Mrs. Suitum is allowed "to have her day in court".

The single-family, vacant homesite purchased by Mr. & Mrs. Suitum nearly 25 years ago as the site of their dream-of retirement home is a level lot slightly less than 1/2 acre in size (approximately 18,300 square feet), located in the now built-out Mill Creek Subdivision located in a heavily urbanized portion of the community known as Incline Village, Nevada.[4] That residential subdivision was first developed in the early 1960s pursuant to a Final Subdivision Map and all other required approvals granted by the County

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[4] Mrs. Suitum's parcel is identified in the Official Records of Washoe County, Nevada, as Lot 15, Block K, Mill Creek Subdivision, Assessor Parcel No. 130-211-31, and would have a street address of 159 Mayhew Circle, Incline Village, if a home were to be built upon it.

of Washoe, State of Nevada, in accordance with the then applicable regulatory requirements. The subdivision and all of the separate residential lots are served by paved streets, underground sewers, water, electricity, telephone, and the other amenities of a residential community.

A quick drive through the area quickly shows that Mrs. Suitum's lot is one of only a handful of remaining privately-owned vacant lots out of scores of residential homesites in her subdivision, virtually all of which now have homes constructed on them. In fact, along the approximately 1/4 mile length of the residential street known as Mayhew Circle on which Mrs. Suitum's parcel is located, there are 18 individual homes on both sides of the street, many dating back more than 25 years, and most owned by so-called second homeowners as vacation residences.

Mrs. Suitum's lot, which faces the paved Mayhew Circle road, has homes constructed on each side of her lot, as well as homes constructed on all of the lots to the rear of her lot. Her lot is the only remaining privately-owned vacant lot on her street, although there are also a handful of vacant lots owned by public agencies. It is also virtually the last privately-owned vacant lot in the entire subdivision. It takes an extraordinary mental stretch to conceive how building a home on her lot could possibly have any measurable impact on Lake Tahoe. Nevertheless, it certainly appears Mrs. Suitum is now being required to bear nearly the entire burden for the alleged excesses of development that have already occurred in her subdivision and the surrounding watershed by sacrificing any further use of her lot in the name of the common good.

As to the surrounding watershed, if and when Mrs. Suitum is allowed her day in court, it will become readily apparent to the trier fact that the so-called precious SEZ known as Mill Creek is hardly the type of pristine mountain stream that that term conjures in one's mind. Even a cursory



inspection shows that it is nothing more than a short, heavily-altered watercourse which has been piped, culverted, channeled, moved, and otherwise extensively impacted by the activities of man over the last several decades.

For example, less than a 1/2 mile upstream from Mrs. Suitum's property, the waters from the surrounding mountainside are captured in a reservoir behind an earthen dam known as Mill Creek Dam No. 2. The public record shows that that dam and reservoir were built in 1962 as an emergency waste water storage facility to be used for emergency overflow from the Community Sewer Treatment Plant that is located adjacent to the reservoir. In fact on one occasion in the past the reservoir was used for just such emergency overflow of chlorinated waste water according to the records of the Incline Village General Improvement District which operates the facility.[5]

Waters trapped behind the Mill Creek Dam No. 2 are then released on a controlled basis to run down through a much-altered watercourse still known as "Mill Creek" through a heavily urbanized light industrial area, including the community trash-recycling center which is immediately adjacent to the watercourse. The watercourse then crosses underneath State Highway 28 through a large culvert, and works it way down through the Mill Creek Subdivision and behind Mrs. Suitum's lot through a relocated, man-dug channel which was placed along the back property line of Mrs. Suitum and her neighbors' properties at the time the subdivision was developed to relocate the original meandering stream course. Just a short ways downstream, the watercourse is again culverted where it crosses under still

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[5] See the recent public report entitled "The Legacy of Mill Creek Dam #2" prepared by Daniel M. St. Johns, P.E., and currently the Director of Engineering for the Incline Village General Improvement District.

another major roadway (Lakeshore Blvd.), and then continues until it discharges into Lake Tahoe approximately 1/2 mile downstream from Mrs. Suitum's lot. Also, just a couple of blocks from Mrs. Suitum's lot is one of the Tahoe Basin's largest tourist attractions, the well-known Ponderosa Ranch Amusement Park, that has created enormous disturbance to acres of mountainside that also drain and run-off into the same Mill Creek drainage.

To help the Court better understand the factual setting involved, we have taken the liberty to append to this brief as Appendices the following: Append. A -- 1992 Aerial Photo of Mill Creek Drainage; Append. B -- Copy of "TRPA-Mapped SEZ -- Mill Creek Drainage" showing the TRPA-mapped SEZ boundaries, Mrs. Suitum's lot, and existing residences; and Append. C -- "Portion of Recorded Plat Map -- Mill Creek Subdivision" recorded in 1960 showing the Mayhew Circle portion of the subdivision, and depicting whether the individual lots currently have homes constructed upon them or remain vacant.

Unfortunately for Mrs. Suitum, she has several strikes against her. First, when her husband was still alive, the Suitums made what now appears to be the foolish decision to sit still while their neighbors were building their homes, rather then sprinting off to get their own home into the ground. Secondly, they made the apparent mistake of purchasing a homesite that had a small, relocated creek running along the rear boundary line of the lot. Because of the proximity to that creek, Mrs. Suitum's virtually flat and easily buildable lot, which has only a few second-growth pine trees, is primarily vegetated today with what TRPA now labels as "riparian vegetation" -- willows and field grasses -- that are deemed by TRPA to be prime indicators of a SEZ, and thus deserve "heightened protection". Apparently, TRPA views the root systems of those willows and field grasses as being crucial to its strategy of ensuring that the SEZ continues to function as a nutrient uptake area. Hence



TRPA's total prohibition on any soil disturbance -- even a shovelful -- on Mrs. Suitum's lot, so as not to further disturb what TRPA apparently believes is such a critically-important root system that it requires permanent protection.

### C. TRPA's Broadbrush Regulatory Prohibitions and Its Creative Defenses

TRPA's broadbrush regulatory restrictions are virtually blind to what is on the ground, nor do they even attempt to address the abuses of yesteryear. Rather, TRPA takes the simplistic and presumably more easily enforceable approach of simply barring Mrs. Suitum, and any other private property owners who may still own *vacant* land within mapped SEZs, from making any new use or disturbance on their vacant land. No, TRPA did not say that Mrs. Suitum could build a home like her neighbors if she could show how she would do so and also prevent any erosion or soil nutrients from reaching the Mill Creek drainage, which in her case would be quite easy to do with an appropriate rear-yard berm or wall, given the level nature of her lot and the long distance between the rear of her building site and the watercourse. Nor did TRPA allow her to build a home if she would revegetate with high nutrient-uptake vegetation the areas along the banks of the watercourse and on the rear portion of her lot, which in her case would also be relatively easy to do as it is essentially just an open grass areas. Nor did TRPA say she would be allowed to build if she would provide her fair share of mitigation elsewhere in the watershed to help correct some of the abuses that had already occurred in the watershed and along the watercourse. Rather, TRPA simply said **NO** -- because we have determined that your lot is properly classified as being within a SEZ, we have concluded that it is simply too valuable to the protection of Lake Tahoe to be used for your homesite, and it must therefore remain vacant into perpetuity.

Having intentionally chosen to draw the line in the sand, TRPA then decided to hunker down and to defend the righteousness of its decision to the bitter end. Thus, instead of turning its energies to raising the necessary dollars from its two Sister States, who historically have shown a strong commitment to help fund environmental programs at Lake Tahoe,[6] and to purchase the remaining undeveloped lots in the Mill Creek drainage at true fair market value, TRPA chose to pass the baton to its talented and certainly tenacious Blackbelt self-defenders.

TRPA's first line of defense was a rather ingenious but circular argument that because the Legislatures of the States of California and Nevada, in creating the bi-state Tahoe Regional Planning Compact, had not acted to convey upon TRPA the power of *direct* condemnation -- nor to give TRPA a budget to acquire environmentally sensitive lands -- that *a fortiori* TRPA could not be sued or liable in *inverse* condemnation. Somewhat inexplicably, but most likely because it wore the proverbial white hat, early on the sympathetic local Federal District Court and as well as at least one panel of the Ninth Circuit found compelling logic in this argument. Thus, without citation to any other authority or much analysis, the Ninth Circuit concluded in ***Jacobson v. Tahoe Regional Planning Agency***, 566 F.2d. 1353, 1358 at n. 7 (9th Cir. 1977), "TRPA was given only the power to regulate, not the power to condemn", and

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[6] For example, at the November 5, 1996 elections, the voters of California approved another Water Quality Bond Measure (Proposition 204) that will make an additional $10,000,000 available on the California-side of Lake Tahoe for acquisition of "sensitive lands" and water quality improvements; and the voters of Nevada approved Measure 12, a $20,000,000 bond proposition for water quality improvements applicable to the Nevada-side of the Basin.



therefore could not be liable in damages for inverse condemnation.

That first line of defense held the tide back for nearly 13 years until it was successfully breached in a lawsuit pursued by Amicus Curiae on behalf of several hundred similarly-situated Tahoe property owners. Thus, in 1990, the Ninth Circuit was finally persuaded, following this Court's decision in ***First English Evangelical Lutheran Church v. County of Los Angeles***, 482 U.S. 304 (1987), to revisit its earlier ruling in ***Jacobson***. In ***Tahoe-Sierra Preservation Council, Inc., v. TRPA***, 911 F.2d. 1331 (9th Cir. 1990) [***TSPC I***], the Ninth Circuit was compelled to conclude the ***Jacobson*** reasoning "is at odds" with ***First English*** -- ". . . even a temporary regulation may result in a substantial burden to landowners, and '[w]here this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land . . .'" *Id.* at 1341.

But not undaunted, TRPA's self-defense experts returned to their arsenal, this time pulling out a new array of "ripeness and mootness" weapons . . . new mines in the minefield they placed across the access route to the courthouse. Again, one by one, those new mines were also defused in the litigation brought by other property owners, including the Amicus Curiae. See the host of ripeness and mootness defenses raised by TRPA in ***TSPC I, TSPC II,*** and ***TSPC III, supra***, addressed at length by the Ninth Circuit in those cases.

That effectively left TRPA with its last remaining rear-guard defense -- the cleverly-labelled "Transfer of Development Rights" gimmick crafted by its team of self-defense experts. We need not belabor here the myriad of details involved in those TDR measures, as those details have

been thoroughly briefed and discussed by the parties in their briefs.

Rather, stated simply, what TRPA intended to do in that artfully-crafted maze of TDR ordinances was to set up the very argument it subsequently made with success to the lower courts in the instant case, an argument that runs as follows: "Your Honor, we did not take all of Mrs. Suitum's property . . . in fact, we have given her new "uses" . . . the right to receive from us special TDR chits that she can redeem in the new TDR marketplace we have also created by our regulations. All she needs to do is to take one or more of those chits into that marketplace and find a private property owner who owns property elsewhere in the Tahoe Basin whom we have also regulated, but who is now motivated to pay Mrs. Suitum some money for one of those chits . . . so that that other property owner can now build a slightly bigger home using slightly more coverage than would otherwise be allowed. In fact, we will then allow Mrs. Suitum to sell that property owner up to 183 square feet of coverage (13.5 sq. ft. x 13.5 sq. ft.) off her SEZ lot to that buyer at the going marketrate, which we understand is from $5 to $8 per sq. foot. No, we do not know who that other buyer will be, but we are sure there must be someone out there if only Mrs. Suitum would try . . . because we know our regulations are so tough and we limited others so severely that they will be chafing at the bit to purchase the TDR chit from Mrs. Suitum. No, we really do not know exactly how much they will offer to pay, nor do we really care . . . because what is really important is that Mrs. Suitum can probably receive some dollars for the land coverage we will allow her to transfer, and if so, then it is clear that she has some "use" left in her SEZ lot that would defeat her takings claim. Certainly she should not be allowed to clog up the courts until she has fully exhausted every attempt to avail of herself of these special TDR rights, nor is her case "ripe" until she has done so."



The sad fact is that this last-ditch defense worked -- at least before the District Court and the Ninth Circuit. Now more than nine years after TRPA prohibited all further use or construction on her lot, Mrs. Suitum is but another victim of TRPA's no-holds-barred war of attrition . . . still fighting her well-funded public agency adversaries to try to have her day in court.[7]

## II

## THE NINTH CIRCUIT'S APPROACH IN THIS CASE, IF ALLOWED TO STAND, CARVES A GAPING HOLE INTO THE "CATEGORICAL TAKINGS RULE" CAREFULLY CONSIDERED AND ARTICULATED BY THIS COURT IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL.*

Four years ago, this Court determined under facts remarkably similar to the facts of the instant case that a property owner who has been denied ***all*** economically beneficial ***use*** of his or her vacant single-family residential property as a result of the adoption or application of a governmental land-use regulatory enactment has suffered a "categorical taking" invoking the protection of the Fifth

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[7] As the long, litigious battle underscored by the three Ninth Circuit opinions in ***TSPC I, TSPC II*** and ***TSPC III*** makes crystal clear, TRPA is no neophyte when it comes to waging wars of attrition. At least five times the district courts have ruled in favor of TRPA in that ***TSPC*** litigation, only to be reversed on significant issues three times by the Ninth Circuit, not to mention TRPA's most recent unsuccessful Writ of Certiorari to this Court. Those consolidated cases are now in their 12th year of litigation, and are back in the District Court where a stay has been granted pending lengthy mediated settlement efforts currently in progress.

Amendment. Thus, in ***Lucas v. South Carolina Coastal Council***, *supra*, this Court attempted to set this long-lingering issue to rest when it held:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Id.* at 1019. [emphasis in original]

In ***Lucas***, this Court carved out only one narrow exception to the "categorical rule" it enunciated, an exception which is not relevant here -- i.e., where the regulation deprives the landowner of all economically beneficial use of his or her land, the State "may resist compensation only if . . . [it] shows that the proscribed use interests were not part of his title to begin with." ***Lucas***, 505 U.S. at 1027.

Nowhere in ***Lucas*** did the Court suggest or even hint that there may be still another gaping hole in the protections afforded by the Fifth Amendment, such as that now suddenly fashioned by TRPA's creative self-defense experts and sold to the District Court and the Ninth Circuit in the case of the Petitioner.[8] That new "exception" if allowed to stand will most likely quickly be latched onto by numerous other land use regulators, at least throughout the Ninth Circuit, as a way to help protect them from suit, thus threatening to again submerge the well-articulated substantive rule in ***Lucas*** into a new procedural quagmire.

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[8] Inexplicably, in spite of the clear import of this Court's decision in ***Lucas***, the Ninth Circuit in its Opinion in the instant case made no mention of nor reference to ***Lucas***, nor did it offer any explanation whatsoever as to why it did not consider ***Lucas*** to be relevant to its analysis.



Pursuant to this newly-created "ripeness exception" to the ***Lucas*** categorical takings rule, all the regulatory agency apparently has to do when it adopts a land use regulation prohibiting ***all*** economically beneficial ***use*** of a person's private property in the name of the common good is to be sure to include a provision granting that property owner some form of post-takings "transferable rights" -- purported new "rights" the property owner may or may not be able to sell at some unknown point in the future to some unknown buyer, and for some unknown amount of dollars, in a secondary TDR marketplace created by the agency resulting from the placement of an artificial limit on the availability of those "rights" to other regulated property owners. Thus, by the magic stroke of the regulator's pen, the agency is again able to insulate itself from a takings challenge, at least until the property owner whose land has been prohibited from use first demonstrates that he or she has attempted to fully navigate this new TDR maze by showing how or in what manner the purported TDR "rights" did or did not ultimately provide that owner with any modicum of post-takings compensation. The result is to place an enormous if not impossible new burden on the property owner -- in this case Mrs. Suitum -- thus effectively blunting the clear dictates of the ***Lucas*** categorical takings rule.

The reality is that the cleverly-crafted TDR gimmick fashioned by TRPA as part of its regulatory scheme has nothing at all to do with Mrs. Suitum's ***use*** of her property, but in fact is merely a transparent attempt to allow her the possibility of recouping some very limited post-takings ***dollars*** in a highly speculative secondary private marketplace created by TRPA as part of its self-defense efforts.[9]

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[9] To hammer the last nail into the proverbial coffin, TRPA also ordained that even if Mrs. Suitum decided to exercise her precious new "right" to sell one or more of the TDR chits it had belatedly bestowed upon her, she must first

Unfortunately, both the District Court and the Ninth Circuit fell for this gimmick lock, stock and barrel just as TRPA's self-defense experts had intended -- concluding that in fact the TDRs purportedly made available to Mrs. Suitum created a potential new ***use*** of her property that must first be fully exhausted and evaluated as part of the "takings calculus" before she could file and pursue her takings claim in federal court. See Ninth Circuit's conclusion that the "transfer of development rights is a 'use' of SEZ property" -- Appendix A-9 to Petition for Writ of Certiorari. But the unvarnished truth is this TDR gimmick -- no matter how high-sounding its label -- has nothing whatsoever to do with the ***uses*** available to Mrs. Suitum on her own property or any other property she owns to which they can be transferred, but only with the highly speculative recoupment at some later time of a few ***dollars*** for the loss she has already suffered.

***Lucas*** leaves no question that the proscription of the Fifth Amendment that "private property shall [not] be taken for public ***use***, without just compensation" means exactly what it says. As was repeatedly underscored by this Court in ***Lucas***, the central focus is necessarily on the ***uses*** that

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agree to record a "Deed Restriction" which "permanently retired" her lot -- that is, requiring her "voluntarily" to agree to permanently greenbelt her lot in order to exercise her "privilege" to recoup some meager portion of her lost value by selling one of the TDR rights, assuming she could even find a buyer. And, to add further insult to injury, the Ninth Circuit found that Mrs. Suitum had no ability to seek redress in the courts unless and until she first attempted to sell one of those TDR rights, and if somehow she were successful in finding a buyer, first "Deed Restricting" her property, at which point her case would finally "ripen" sufficiently for federal court review.



have been circumscribed by the governmental regulation at issue, that is the ***uses*** which remain after the regulation has become effective, not the amount of devaluation of the property due to the regulations. Time and again, this Court in ***Lucas*** stressed this primary focus as to the ***uses*** which remained after the regulation's adoption. See, for instance, the discussion in the majority opinion in ***Lucas*** at 1015: "The second situation in which we have found categorical treatment appropriate is where regulation denies all ***economically beneficial or productive use*** of land"; and at 1015, citing ***Agins v. Tiburon***, 447 U.S. 255 at 260, ". . . the Fifth Amendment is violated when regulation . . . denies an owner ***economically viable use*** of his land"; and at 1016, citing ***Keystone v. Bituminous Coal v. DeBenedictis***, 480 U.S. 470 at 495: "A statute regulating the ***uses*** that can be made of property effects a taking if it 'denies an owner ***economically viable use*** of his land'"; and at 1016, fnt. 7: ". . . the force of our 'deprivation of ***all economically feasible use***' rule is greater than its precision . . ."; and at 1019: ". . . when the owner of real property has been called upon to sacrifice ***all economically beneficial uses*** in the name of the common good, that is to have his property economically idle, he has suffered a taking."

In the case of Mrs. Suitum -- as was the case with Mr. Lucas's beachfront property in South Carolina -- there is simply no dispute that the regulations adopted in the name of environmental protection did in fact deny her ***all use*** of her vacant, single-family residential parcel located in a nearly built-out, residential neighborhood. Thus, effective upon the date of TRPA's adoption of the SEZ regulations and their application to her property, Mrs. Suitum's private property became entirely ***useless***[10]. In a nearly identical manner, the

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[10] While Mrs. Suitum did "appeal" the correctness of TRPA's SEZ designation of her lot, that appears to have been both an unnecessary and futile act. TRPA's regulations

South Carolina Beachfront Management Act, as it was implemented by South Carolina's Coastal Council, also placed Mr. Lucas's single-family residential lots in a "coastal protected area", as to which all new "occupiable improvements was flatly prohibited." ***Lucas***, 505 U.S. at 1009.[11]

In any event, it cannot and has not been disputed that the clear effect of TRPA's regulatory enactments at issue was to prohibit the construction of a home on Mrs. Suitum's single-family homesite, the only remaining viable ***use*** that would otherwise be consistent with the underlying zoning and "allowed uses" in the surrounding residential neighborhood, all in the name of "environmental protection" for the common good. Following ***Lucas***, that should have been the end of the inquiry, but regrettably that is not the case.

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and mapped SEZ designation of Mrs. Suitum's lot were hardly likely to be modified by the same agency that had already field-verified and mapped the SEZ boundaries. That supposed appeal process was really nothing more than another round in the war of attrition. In fact, the taking of Mrs. Suitum's lot became operative the day the SEZ prohibitions went into effect -- a takings that was clear on the face of the regulations.

[11] Interestingly, in ***Lucas*** the regulations there at issue would have allowed Mr. Lucas to actually construct certain small walkways and decks on his beachfront parcel having a total area of not more than 144 square feet, which even this Court found hardly was a viable "use" sufficient to defeat his takings claim. See ***Lucas***, 505 U.S. at 1009, ftnt. 2. In contrast, the TRPA regulations at issue did not allow Mrs. Suitum to make even that minimal "use" of her property by constructing a similar small structure on her property.



## III

## IF ANYTHING, THE TDRs AT ISSUE GO TO THE MATTER OF "JUST COMPENSATION", AND HAVE NOTHING WHATSOEVER TO DO WITH THE "RIPENESS" OF MRS. SUITUM'S TAKINGS CLAIM.

How should the so-called TDRs purportedly made available by TRPA to Mrs. Suitum, and for that matter to other similarly-situated lot owners whose properties were also found by TRPA to be too "environmentally sensitive" to be built upon, be correctly viewed in terms of the takings calculus? The answer to that query, at least in the instant case, seems clear.

Where, as here, those TDRs are at best intended to provide some potential, albeit small, post-takings ***dollar*** recovery to the property owner, not the actual transfer of ***use*** rights by that property owner from one property to another owned by that same property owner, then it would appear those TDRs should only have relevance, if any, to the Just Compensation component of the determination. Under no circumstance, however, should they have any bearing on the issue of the "ripeness" of the property owner's takings case for judicial review. Let us amplify.

This Court has addressed the interplay of TDRs in the takings calculus in only one other case -- ***Penn Central Transportation Co. v. New York City,*** 438 U.S. 104 (1978). In ***Penn Central***, of course, the facts were entirely different, and the TDRs at issue there were shown to be of potentially valuable ***uses*** -- e.g., restricted commercial floor area in downtown New York City. While Penn Central was told by the City of New York that in order to preserve the historic landmark Grand Central Terminal it would not be allowed to build a proposed 55-story office tower immediately above the Terminal, nevertheless under the City's Landmarks Preservation Law, Penn Central was given a special

offsetting right to transfer that same commercial floor area to one or more of at least eight other existing office or commercial buildings owned by Penn Central in the immediate vicinity, thus allowing for the expansion of one or more of those buildings by up to 20% more in floor area than would have otherwise been allowed.

Of course, importantly in the case of Penn Central, it already had a long and valuable existing "use" of its Terminal site. What was being prohibited ("taken") was the potential enlargement of that Terminal into the air space owned by Penn Central above the structure, with the proviso that the property owner could achieve essentially the same total expanded commercial floor area through the enlargement of the nearby commercial buildings it also owned.

In stark contrast to ***Penn Central*** are the facts of Mrs. Suitum's case:

- She is allowed to make no use whatsoever of her own residential property, nor does she seek to enlarge a structure already on that property.

- Unlike Penn Central, Mrs. Suitum has no other property in the vicinity to which she can transfer anything . . . nor is her parcel large enough so that she can move her proposed home from a preferred but environmentally sensitive area to a less desirable building site (transfer her building rights within her same parcel).

- Unlike the obviously valuable commercial floor area Penn Central was being permitted to transfer in exchange for the new restrictions on expansion of the Terminal, Mrs. Suitum is at best merely given the speculative chance under TRPA's chimerical TDR provisions to possibly sell to some



unknown buyer and for some unknown amount a "TDR chit" for cash -- in effect, a redeemable voucher that may or may not have any value, and may or may not be able to be sold in the secondary marketplace created by TRPA.

- And, of course, unlike Penn Central, Mrs. Suitum is also being required to permanently greenbelt her parcel if she avails herself of the TDR option, even though she presumably would still be burdened with all the responsibilities of private ownership, e.g., the payment of taxes and assessments, trash and debris removal, liability risks, and the like.

At best, all TRPA offered to Mrs. Suitum is a "redeemable voucher" -- not even one she can take to her own local government or to TRPA and turn in for compensation. Rather, according to TRPA, somehow through a mystical and yet-to-be-explained process Mrs. Suitum must try to locate a buyer in TRPA's-created secondary marketplace who is willing at some yet-to-be-established price to purchase that redeemable voucher, and then turn it back into TRPA in exchange for something said to be of value -- e.g., 183 square feet of land coverage which TRPA would then hand out, or something called a "development right" purportedly needed only by someone who wants to build a small multi-family structure. It sounds remarkably similar to scrip money paid out when a governmental treasury is barren, on the promise that maybe someday the holder will be able to redeem that scrip money for at least some cents on the dollar.

For TRPA to now suggest that its own TDR program should be analyzed in the same manner as that in ***Penn Central***, and to contend that its own program provides a bona fide "transferable use" that may "negate a takings claim" in reliance on this Court's analysis in ***Penn Central***,

at best strains all credulity. (See TRPA's assertion in its Brief in Opposition to Certiorari, at p. 10.) To then take the next giant leap of faith and contend that based on this Court's decisions in ***Penn Central*** and ***Williamson County***, the burden of first "exhausting" TRPA's labyrinthian TDR maze should be placed upon Mrs. Suitum before her case is "ripe" enough for her to be allowed to have her day in court, goes far beyond what any court in the land has ever held is required before a beleaguered property owner can seek judicial protection of their important Constitutional rights.

***Lucas*** teaches that where as here a public agency has already adopted a regulation which on its face denies ***all*** further ***use*** of private property, and where it seeks to defend that regulation by demonstrating that the proscribed use was in fact prohibited by long-established common law nuisance principles, the burden of making that showing shifts to the public agency. As the Court said in ***Lucas***, it was not Mr. Lucas, but the State of South Carolina which must make that showing should it attempt to defeat Mr. Lucas's otherwise total takings claim. ***Lucas***, 505 U.S. at 1031. That, of course, puts the burden where it properly belongs . . . on the public agency that enacted the regulatory measure which denies all viable use of an individual's private property.

There is no compelling reason not to employ the same approach here, and place the burden where it properly belongs -- on TRPA. If that burden is placed where it belongs, then TRPA can also have its day in Court. Thus, at the time when the judge or jury is determining the amount of Just Compensation to be awarded, TRPA would have the option of showing, if it can, that its TDR program has already given Mrs. Suitum something of intrinsic value equivalent to Just Compensation, and therefore she should be deemed to have received at least the amount of Just Compensation shown to be equal to the TDR's value as a credit against any Just Compensation to be awarded. While it seems unlikely that TRPA will ever be able to carry that



burden, at least by placing the burden on TRPA it falls where it belongs -- upon the agency which created the extraordinary complex TDR scheme to show how it really works in practice.[12]

But to reiterate, the post-taking sale of the Transferrable Development Rights fashioned by TRPA, even if consummated, is in fact nothing more than the sale of a chit of paper -- a redeemable voucher -- that results at best in the recoupment by Mrs. Suitum of a few meager ***dollars***, and has nothing whatsoever to do with the ***uses*** to which Mrs. Suitum can now put her own property. Nevertheless, in muddling the concept of ***uses*** with the concept of ***value***,[13] the Ninth Circuit found that even if Mrs. Suitum could theoretically recoup a small part of her lost ***value*** by the sale of a TDR, that would defeat her takings claim, since "regulatory ordinances that merely diminish the value of property [do] not constitute a taking." Appendix A-12 to Petition for Writ of Certiorari. The difficulty is that by

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[12] Even if TRPA's TDRs and the potential dollars recoverable by their sale are viewed as part of the Just Compensation equation, it is still difficult to conceive how TRPA will meet its burden to show that they are in fact "Just Compensation". As the Ninth Circuit cautioned in ***TSPC I*** in responding to TRPA's assertion that a property owner should first be required to "ripen" his or her case by seeking to pursue funds under one of the state buy-out programs, "it is not 'compensation' (Just or otherwise), either from TRPA or from either of the States . . . " ***TSPC I, supra,*** 911 F.2d. at 1341.

[13] For a most insightful discussion of the issue of "economically viable use" vs. focusing on "remaining market value", see the very recent decision of the Ninth Circuit in ***Del Monte Dunes at Monterey, Ltd. v. City of Monterey***, 95 F.3d 1422 (9th Cir., Sept. 13, 1996).

focusing its attention on this issue of potential ***recoupment of value***, the Ninth Circuit lost sight of the fact that the Fifth Amendment, as *Lucas* instructs, commands that the focus be on the ***uses precluded***. No post-takings remedy designed merely to provide the property owner with the speculative ability to later recoup some limited dollars should have any relevance to whether a "taking" has occurred in the first instance.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions of the District Court and Ninth Circuit at issue are not only in direct conflict with the express holding of this Court in *Lucas* and other applicable case law, but threaten to undermine the essential Constitutional protections afforded by the Fifth Amendment to the Petitioner, as so carefully articulated and we thought settled in *Lucas*. Accordingly, Amicus Curiae joins with the Petitioner in respectfully urging this Court to reverse the holding of the Court of Appeals below, and to issue its opinion and order directing the District Court on remand to proceed with dispatch with the trial on the merits of Mrs. Suitum's case to determine the amount of Just Compensation to which she so clearly entitled.

DATED: November 27, 1996.

Respectfully submitted,

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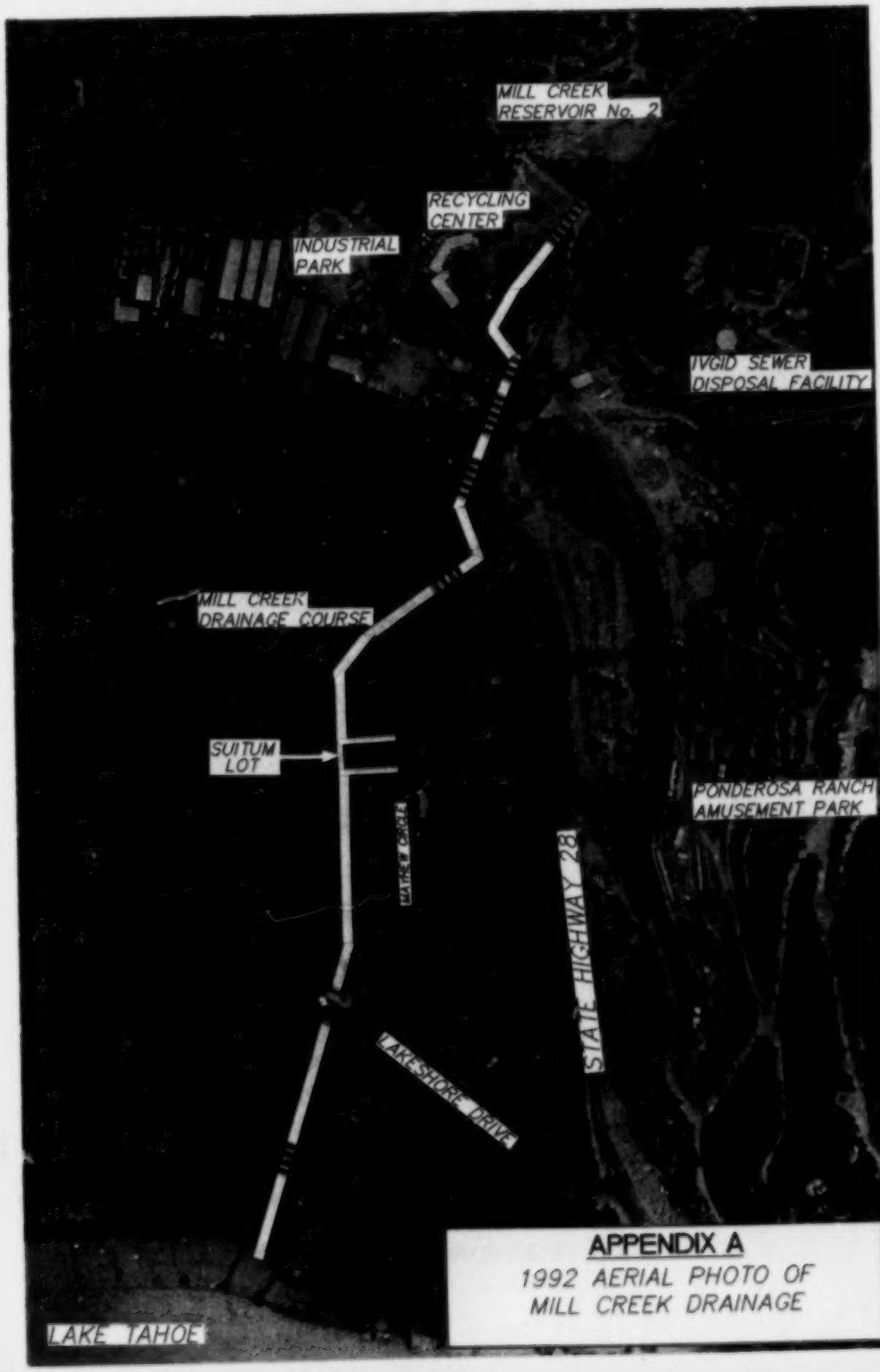
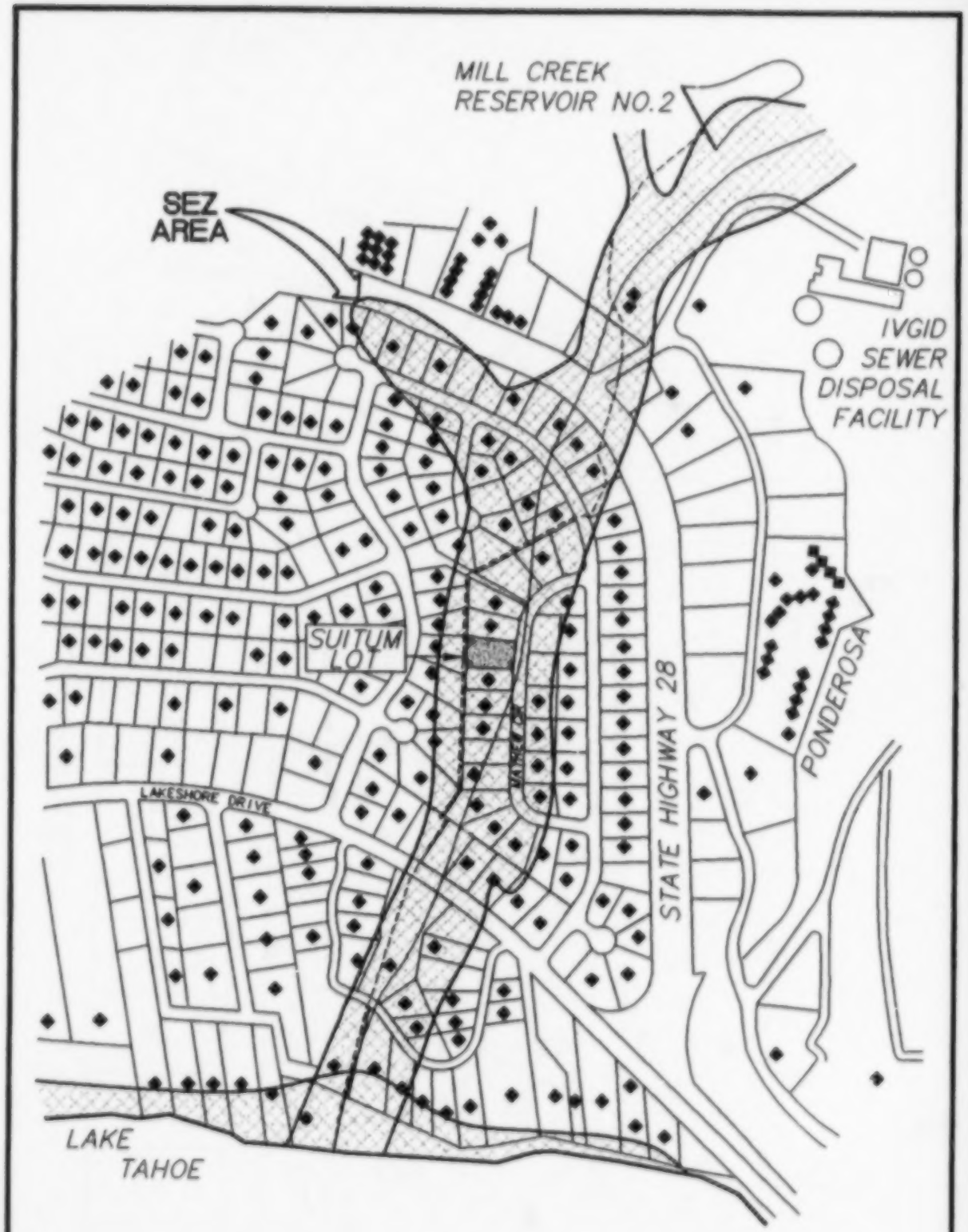
## APPENDICES



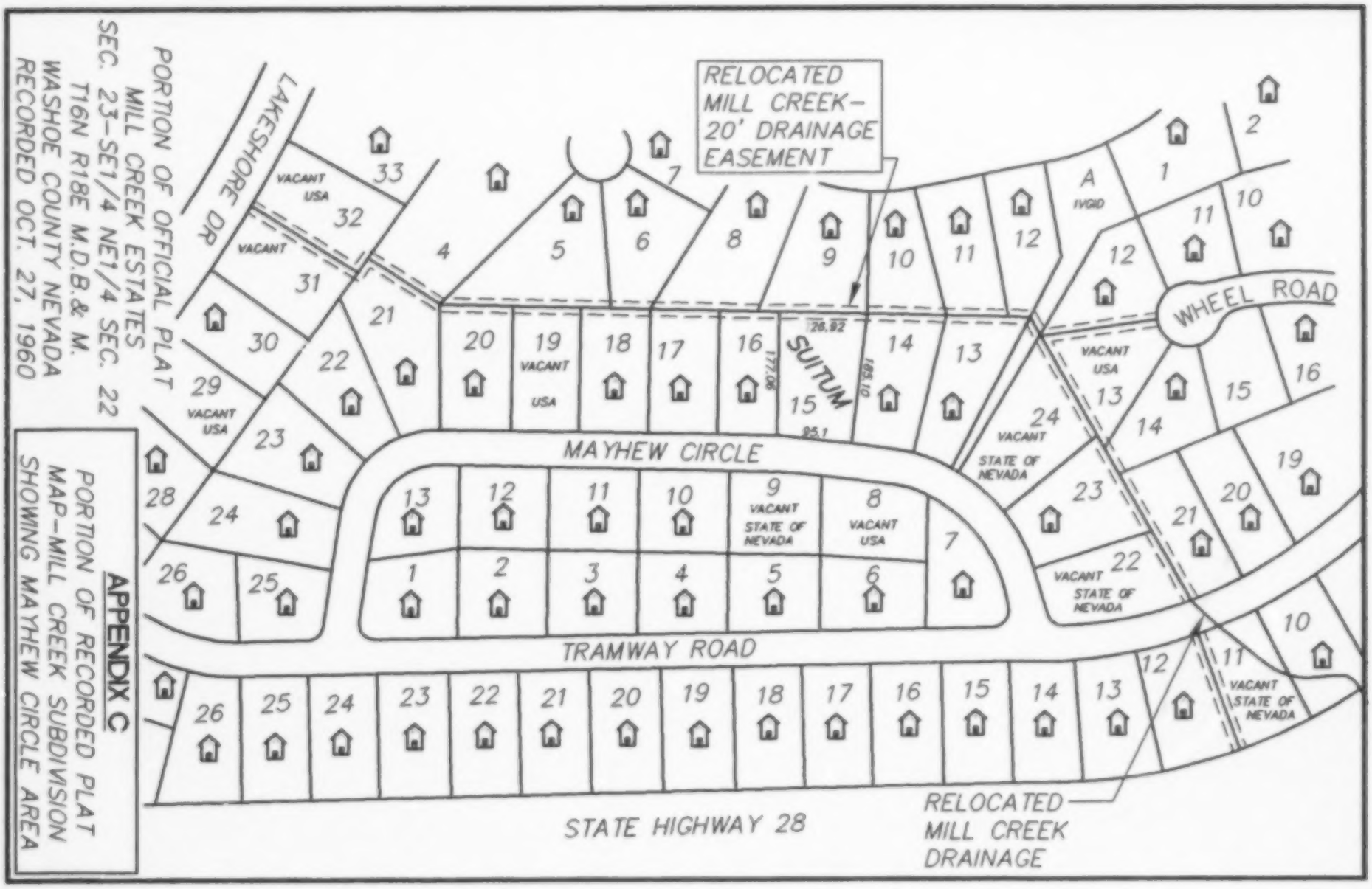

**APPENDIX A**

1992 AERIAL PHOTO OF
MILL CREEK DRAINAGE




**APPENDIX B**

TRPA MAPPED SEZ-
MILL CREEK DRAINAGE
SHOWING EXISTING RESIDENCES


PORTION OF OFFICIAL PLAT
MILL CREEK ESTATES
SEC. 23-SE1/4 NE1/4 SEC. 22
T16N R18E M.D.B.& M.
WASHOE COUNTY NEVADA
RECORDED OCT. 27, 1960
APPENDIX C
PORTION OF RECORDED PLAT
MAP-MILL CREEK SUBDIVISION
SHOWING MAYHEW CIRCLE AREA
LAKESHORE DR
RELOCATED MILL CREEK-20' DRAINAGE EASEMENT
WHEEL ROAD
MAYHEW CIRCLE
TRAMWAY ROAD
STATE HIGHWAY 28
RELOCATED MILL CREEK DRAINAGE
SUITUM
VACANT USA
VACANT STATE OF NEVADA
IVGID

(D)

Supreme Court, U.S.
FILED
NOV 26 1996
CLERK

No. 96-243

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

BERNADINE SUITUM,

*Petitioner,*

*v.*

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

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## INTERESTS OF THE AMICI CURIAE

The *amici* have received the parties' written consent to submit this brief. Letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

The *National Association of Home Builders* ("NAHB") represents over 185,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" in myriad cases to safeguard the rights of landowners to use their property, and to ensure the availability of adequate remedies when those rights are infringed. These include *Agins v. Tiburon,* 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. San Diego,* 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987)[1]; *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); and *Dolan v. Tigard,* 512 U.S. --, 114 S.Ct. 2309 (1994).

The Building Industry Legal Defense ("BILD") Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly-owned subsidiary of the Building Industry Association of Southern California, whose 1400 members include a significant number of residential developers and associate

[1]The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

businesses accounting for 70% of all annual new home construction in the southern California region. The BILD Foundation's mission is to "[d]efend the legal rights of home and property owners." It promotes and supports important legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

The impact of this case on the *amici* is staggering. Negotiating all types of zoning and permit processes, at all levels of government, is a daily fact of life for the members of NAHB and the BILD Foundation. Their development proposals face elaborate and often repetitive reviews from federal regulators, state agencies, and local zoning bodies. The *amici* fully support innovative measures, including fair programs to transfer development rights (unlike the one before the Court), that strike an equitable balance between economic growth, preservation of constitutionally-protected property interests, and environmental protection. However, the *amici*'s members typically confront the all too common prospect of regulations that go "too far"–such as the regime TRPA has foisted upon Mrs. Suitum. For that matter, any of NAHB's or the BILD Foundation's members could be standing in Mrs Suitum's shoes.

When the prospect exists that free speech may be silenced, or when reasonable expectations of privacy may be invaded, courts do not raise barrier after barrier before reaching the merits to determine whether, in fact, constitutional guarantees have been impinged. Mrs. Suitum's situation should not be viewed under a different lens. Her property rights, safeguarded by the Fifth and Fourteenth Amendments, have undoubtedly been violated: *no inch of her property can be developed.* Furthermore, her TDRs



contemplate that 99% of her property is valueless. Yet TRPA and two lower courts have artificially constrained her ability to seek judicial redress for a taking. They have achieved this result by distorting the Court's rulings on "ripeness."

Rationality must be interjected into the ripeness precedents. The Court should take full advantage of the opportunity.

## SUMMARY OF ARGUMENT

This case is about court access and procedural fairness. The Court is not asked to decide whether Mrs. Suitum must be compensated for the taking that has occurred, but simply whether that issue is ripe for resolution.

1. The Court presently has the opportunity to clarify its finality holding in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). A takings claim is not ripe "until the government entity charged with *implementing* the regulations has reached a *final decision* regarding the *application* of the regulations to the property at issue." *Id.* at 186 (emphasis added). Accordingly, once a zoning agency adjudicates the extent to which a person can develop a plot of land (if at all), the harm to property interests is concrete *at that point.* A ripe "case or controversy" thereafter exists.

2. Zoning bodies and lower courts across the country have abused this ruling. They have fabricated additional obstacles before a court can assess the merits of a takings claim—even after the administrative agency has implemented its regulations for a final adjudication causing con-

crete deprivations of property rights. Mrs. Suitum's case represents the culmination of these misinterpretations.

3. TRPA has erected such stumbling blocks in front of Mrs. Suitum's local courthouse doors. The Agency's edict that Mrs. Suitum is unable to put the plot she owns to *any* economically viable use cannot be disputed. This decision is entrenched, but the Agency argues it is not final because of its seriously flawed program to transfer development rights. TRPA has convinced the Ninth Circuit and the district court that Mrs. Suitum's land can be valued only if she sells her TDRs. The lower courts have essentially determined that Mrs. Suitum *must sell* her development rights to some *unknown* third party. Furthermore, TRPA allows Mrs. Suitum to sell only 1% of her lot's "land coverage," while 99% of her property receives no value. Then, if she can consummate a TDR sale, she *must* record deed restrictions forever preserving her land in a virgin state. These facts alone cogently demonstrate the injury to her property interest. They ripen her takings claim *per se*.

4. Moreover, the TDR scheme at issue thrusts Mrs. Suitum into a world where her plot is valued with reference to "lotteries," "bonus units," and land uses that may or may not be permitted, on some other unidentified parcel, owned by some unidentified titleholder. In this regard, TRPA's TDR scheme is unfair and deprives Mrs. Suitum's property without due process. The outcome of this *valuation* process, when and if it will occur, will not displace the Agency's adjudicated conclusion that her property is off-limits, now and forever, to any land *use*.



TRPA's regulation of Mrs. Suitum's property goes "too far." Her takings claim is ripe *now*.

## ARGUMENT

### I. MRS. SUITUM'S CLAIMS ARE RIPE, BECAUSE TRPA HAS FINALLY ADJUDICATED THE EXTENT OF PERMISSIBLE LAND USES ON HER PROPERTY.

One of the "basic rationale[s]" of the ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49 (1967). The Court instructs that the "finality" element for ripeness must be interpreted "in a pragmatic way." *Id.* at 149-50. Litigation in the takings arena does not depart from the rudiments of a final decision causing concrete harm. Before a court can decide if government action has effected an unconstitutional taking without just compensation, a final decision must be obtained "regarding how [a property owner] will be allowed to develop its property." *Williamson County,* 473 U.S. at 191. This requires "the initial decisionmaker" to deliver "a definitive position on the issue that inflicts an actual, concrete injury ...." *Id.* at 192.

Under this standard TRPA's decision is "formalized" and "definitive," and Mrs. Suitum perceives its effects in a "concrete way": she cannot develop her plot. TRPA has reached a final decision that her land is within a Stream Environmental Zone ("SEZ"). As the district court recognized below, no variance procedure is available to permit construction on parcels, like Mrs. Suitum's, within a SEZ. *See* App. C at 2 (TDR sale is "the only avenue not yet pursued"). Additionally, because her land is in a SEZ, TRPA

permits Mrs. Suitum to sell "land coverage" rights that total only 1% of her lot's acreage. TRPA Code § 20.3.A, App. F-1. In other words, 99% of her plot is worthless under the regulation. "There is no hint that [TRPA's] decision is informal," and its draconian impact on Mrs. Suitum is "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *See Abbott Laboratories,* 387 U.S. at 151.

### A. For Ripeness Purposes, a Final Decision Requires that an Agency or Court Render Some Adjudication.

No issue remains that TRPA can, or must, resolve regarding the scope of permissible land uses on Mrs. Suitum's property, or the extent of her saleable rights. Accordingly, she has amply satisfied the finality requirement for a takings claim. A common thread connects this Court's ripeness opinions. That motif is "adjudication." Just compensation claims have been considered unripe where a property owner did not: (1) submit initial development plans for approval in the first instance;[2] (2) submit to a process to obtain a permit that may allow development;[3] (3) apply for a variance or waiver from applicable land use regulations;[4] or (4) provide alternate

[2] *Agins v. Tiburon,* 447 U.S. 255, 260 (1980) (takings claim challenging zoning ordinance held unripe, because property owners had not yet submitted development plans).

[3] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1011-13 (1992) (had a "special permit procedure" to the Coastal Council, for the purpose of determining permanent deprivations of viable land uses, been available to petitioner, he would have been required to pursue those avenues for a ripe takings claim).

[4] *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 297 (1981) (Court rejects facial challenge to Surface Mining



or scaled-down development plans compared to an initial proposal.[5]

All of these avenues require some regulatory body to act in an adjudicative capacity. In each situation a hearing is held whereby the parties present evidence; thereafter, an administrative agency is called upon to issue some judgment, determination, or decree relevant to the factual findings it made. *See* BLACK'S LAW DICTIONARY at 39 (5th ed. 1979) (definition of "adjudication").

For example, "'[a] variance provides relief from the application of a land use regulation....For this reason, the granting of a variance is an adjudicatory function' ....

(..continued)
Control and Reclamation Act, because "[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance ... or a waiver ...."; thus, takings claim "not ripe for judicial resolution"); *Williamson County,* 473 U.S. at 192 (1985) (takings claim not ripe because developer had not sought variances from zoning ordinance). In addition to finality requirements, *Williamson County* added the additional hurdle that a takings claimant must first pursue inverse condemnation proceedings for a ripe claim. 473 U.S. at 194-95. The Ninth Circuit recognized below that only the "final decision requirement" is presently at issue. *Suitum,* 80 F.3d at 362.

[5] *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 348 (1986) (property owners submitted only one subdivision proposal rejected by a zoning body; as alternative uses of the site existed other than the one proposed, the takings claim was unripe because the zoning body had not yet rendered "a final and authoritative determination of the type and intensity of development legally permitted on the subject property"); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 136-37 (1978) (property owners had not sought approval for any plan other than constructing a 50-foot office building above Grand Central Terminal; thus it was unclear whether the Landmarks Preservation Commission would deny approval for all uses).

*Given the rationales for the ripeness doctrine, the final decision prong must be limited to adjudicatory relief.* In essence, the ripeness doctrine requires that the land use agency adjudicate the permissible uses of a given parcel of property." Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. LAND USE & ENVT'L L. 91, 111 (1994) (emphasis supplied).

As the Court recognized in *Williamson County,* a takings challenge ripens when "the initial decisionmaker has *arrived at a definitive position on the issue* that inflicts an actual, concrete injury." 473 U.S. at 193 (emphasis supplied). The Court thus censured the developer-respondent for failing to ask that the planning commission adjudicate variance requirements for density and other site-related matters. *Id.* at 188. In other words, the Court believed certain avenues were still available for the planning commission to decide permissible land uses upon a factual record, where the commission could (or could not) have found in the developer's favor.

**B. TRPA has Already Decided that Mrs. Suitum Cannot Develop her Property. The TDR Scheme at Issue Requires No Further Adjudication to Confirm this Result.**

In contrast, the decision here is final because there is nothing *left* for TRPA to adjudicate. Mrs. Suitum submitted plans to construct a house in 1989. TRPA thereafter decided that *no* development would be allowed because the parcel is within a SEZ. Submitting a scaled-down proposal *à la MacDonald* would have thus proved futile. Mrs. Suitum then appealed TRPA's decision to the



Governing Board for adjudication which, after a public hearing, denied her claim on November 29, 1990. No avenue remains to challenge the SEZ classification, or TRPA's conclusion that her land is utterly unusable. Now she is forced to sell her property rights in the form of TDRs.

Assuming Mrs. Suitum beats the odds stacked against her and locates some eligible purchaser through TRPA's unfair TDR process (*see infra* at 18-21), no issue remains for the Agency to adjudicate: it would merely approve the sale. That approval will not alter the foregone conclusion that her plot is undevelopable, nor will it expand the amount of Mrs. Suitum's marketable land coverage from its minuscule 1%. *Moreover, if she cannot locate a TDR buyer, TRPA's code provides for no waiver or variance procedure to get out from under the SEZ pigeonhole.* The district court below recognized as much. *See* App. C at 2.

In short, the procedures leading to the SEZ categorization, and the TDR process, are mutually exclusive. The Agency's unforgiving decision that Mrs. Suitum cannot build her home, or anything else, does not rest on some ripening agent in the form of a hypothetical TDR sale.

The Ninth Circuit below stated that the "[b]y failing to apply to the TDR program, Suitum denied TRPA the ability to grant a 'different form[] of relief ... which might abate the alleged taking.' " *Suitum,* 80 F.3d at 362; App. A-9 (citing *Southern Pac. Transp. Co. v. Los Angeles,* 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991)). However, the "different form[s] of relief" contemplated by *Southern Pacific Transportation* all require an exercise of adjudicative decisionmaking and, thus, are

inapposite to the TDR scheme at issue. For example, the appellants in *Southern Pacific Transportation* did not submit a "meaningful application" to provide "local decisionmakers ... an opportunity to review at least one reasonable development proposal ..." *Id.* at 503, 504. The federal court was "required to guess ... how the City might have responded to these imaginary applications ...." *Id.* at 504. In contrast, TRPA's decision *now* is that Mrs. Suitum's land is within a SEZ, it is off-limits to development, and 99% of her acreage is worthless.

The present process for selling TDRs is thus distinguishable from a variance adjudication process, and the Ninth Circuit was incorrect in concluding that they both "effect[ ] the same purpose." *Suitum,* 80 F.3d at 363; App. A-9. The Agency's settled verdict would not change after some imaginary TDR sale closes.

### C. The Court should Resolve the Confusion Engendered by *Williamson County,* and Clarify that a Takings Claim is Ripe Once there is a Final Adjudication on the Extent of Permissible Land Uses.

The lower courts have lost sight of the requirement that a final *adjudication*, regarding what a landowner can and cannot do on her property, is needed to ripen a takings claim. As a result, one survey reveals that less than 6% of land use takings cases between 1983-1988 had been found ripe for review. *See* Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause, supra,* 10 J. LAND USE & ENVT'L L. at 92, n.3. Such opinions have caused hardship and despair to persons who, like Mrs. Suitum, seek court



access so their legitimate takings and due process claims can be heard.[6]

NAHB respectfully submits that *Williamson County* itself has spawned this confusing and harsh array of decisions. The success of the Planning Commission there in obfuscating the role of boards of zoning appeal in the land use process, particularly regarding their authority to adjudicate appeals from decisions of administrative agencies, is the genesis of the "ripeness mess." *See generally* Michael M. Berger, *The "Ripeness" Mess in*

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[6] *See, e.g., Southview Assocs. v. Bongartz,* 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993) (takings claim not ripe where landowner "did not attempt to modify the location of the units or otherwise seek to revise its application"; no indication regarding how many reapplications are necessary before claim ripens); *Tahoe-Sierra Preservation Council, Inc. v. TRPA,* 911 F.2d 1331, 1136 (9th Cir. 1990), *cert. denied,* 499 U.S. 943 (1991) (even where agency determines extent of permissible land uses, takings claim unripe because landowner must lobby to amend the zoning ordinance; less than a year later, the Ninth Circuit reversed in part, 938 F.2d 153, 157 (9th Cir. 1991) (ripeness does not require landowner to seek legislative amendment)); *St. Clair v. Chico,* 880 F.2d 199, 203 (9th Cir. 1989) (takings claim not ripe because property owner could have scaled down the proposal and negotiated "political concessions" with the agency); *Kinzli v. Santa Cruz,* 818 F.2d 1449, 1454-55 (9th Cir. 1987), *cert. denied,* 484 U.S. 1043 (1988) (land downzoned to open space classification, upon which no development could occur; takings claim nevertheless unripe because property owner never submitted a development plan); *Carpenter v. TRPA,* 804 F. Supp. 1316, 1325 (D. Nev. 1992) (implying property owner must scale down proposal and seek transfer of TDRs for *future* projects, before takings claim will ripen); *Villas of Lake Jackson, Ltd. v. Leon County,* 796 F. Supp. 1477, 1480-81 (N.D. Fla. 1992) (takings claim unripe because property owner did not allege in complaint that he requested approval of permits that *required,* under county ordinance, that 95% of his property remain undeveloped); *Weissman v. Fruchtman,* 700 F. Supp. 746, 754 (S.D.N.Y. 1988) (to ripen takings claim, property owner must first obtain certificate from another agency verifying that landlord did not harass tenants).

*Federal Land Use Cases,* 1991 INST. ON PLANNING, ZONING AND EMINENT DOMAIN, 7-1—7-38 (SW. LEGAL FOUND.).

The underlying record in *Williamson County* reveals that the developer, at the written suggestion of the County Planning Commission, had in fact obtained an adjudicated and final decision in 1980 from the Board of Zoning Appeals ("BZA"). Acting under its statutory authority to hear appeals from decisions of County officials, the BZA affirmatively decided that a 1977 ordinance, which would have drastically curtailed the project's approved density compared to the 1973 law, did *not* apply to the developer's plan. *See Williamson County,* 473 U.S. at 180 n.3, 181. "[S]everal approvals" had already been granted under the 1973 ordinance. *Id.* at 179, n.2, 181; Brief of Respondent, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (No. 84-4) at 11. The Planning Commission actively participated in the BZA proceedings regarding the governing law issue, and was represented by counsel. (*See* Transcript of Proceedings Before Supreme Court ("Tr."), *Williamson County,* at 44.) It lost. (Tr. 7.)

Yet, the record reflects that *the Planning Commission never sought judicial review of this BZA ruling.* (Tr. 8, 45.) Thus, it appears that the developer *did* obtain a final adjudication concerning the application of the zoning ordinance and subdivision regulations to its property.

At that point, it was incumbent on the Commission to obtain judicial review of the BZA's ruling. Nevertheless, the Planning Commission "declined to follow" the BZA's



decision. *Williamson County,* 473 U.S. at 181-82.[7] It maintained that the developer–not the Planning Commission–failed to obtain the requisite final decision regarding the correct governing ordinance, *when in fact the BZA had already resolved that issue in the developer's favor. Id.* at 181-82, 188-90. Specifically, the Planning Commission argued that the developer should have returned to the same BZA and applied for variances from density and other requirements that had been enacted subsequent to 1973.[8]

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[7] At oral argument, Justice Brennan inquired why the Planning Commission "didn't go to a court" to challenge the BZA's decision. Petitioner's counsel responded that the Commission expected the developer to present a new plat. (Tr. 8.) Following a recess, counsel further explained that the Commission "relied upon" an opinion of the Attorney General for the State of Tennessee, rendered "shortly after" the BZA's decision, stating "in effect" that the BZA lacked jurisdiction in the matter. (Tr. 10.) That opinion was never identified, nor made part of the record. Its date is unknown. It is not cited in any of Williamson County's briefs or in the Court's decision. Even if the Planning Commission relied on some Attorney General opinion, this would not detract from the finality of the BZA's decision, nor would it excuse the Commission's failure to seek court review of the BZA's adjudication.

[8] It appears that the Planning Commission in *Williamson County* apparently settled these issues when it granted variances while the case was pending at the circuit level. 473 U.S. at 184, n.7. Moreover, these variances presumably would have readdressed those issues, including the overarching question of allowable density, that the BZA determined in its 1980 decision, as well as subsidiary issues that arose after regulatory amendments enacted since 1973 (such as length of cul de sacs, road grade, and frontage requirements). *Williamson County,* 473 U.S. at 179-80, 188, n. 9. As the BZA decided that post-1973 regulations were inapplicable, it is questionable whether variances were even needed. No variance is required when proposed development is consonant with applicable zoning regulations. *See Del Monte Dunes v. Monterey,* 920 F.2d 1496, 1502 (9th Cir. 1990).

The BZA, however, already disposed of this issue in its unchallenged 1980 ruling. *Id.*

To conclude, "the takings clause of the Fifth Amendment, [is] as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, [and] should [not] be relegated to the status of a poor relation ...." *Dolan v. Tigard,* 512 U.S. ---, 114 S.Ct. 2309, 2320 (1994). Deprivations of Mrs. Suitum's property rights merit the same level of judicial access and scrutiny as any other constitutionally protected interest. When property is taken by final agency action without compensation, lower courts are not asked to sit as "the Grand Mufti of local zoning boards." *Hoehne v. County of San Benito,* 870 F.2d 529, 532 (9th Cir. 1989). Such condescension of federal courts against land use cases[9] "forget[s] that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922) (Holmes, J.) Mrs. Suitum has called upon the federal courts to perform their unique task of testing the constitutional parameters of government action. *Williamson County* should no longer be misused to gut takings challenges where, as here, concrete and ascertainable injuries flow from adjudicated and final land use decisions.

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[9]Commentators have recognized that "federal courts seem to consider land use takings cases unimportant." Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause, supra,* 10 J. LAND USE & ENVT'L. L. at 92 (noting that one decision confronting violations of the Fifth and Fourteenth Amendments viewed the case as simply "a garden-variety zoning dispute dressed up in the trappings of consti-



## II. TRPA'S TDR SCHEME DEPRIVES MRS. SUITUM OF HER PROPERTY WITHOUT DUE PROCESS OF LAW.

The Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty or property without due process of law." U.S. CONST. AMEND. XIV. A regulation that "goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment." *Williamson County,* 473 U.S. at 198. This is the case here.

### A. TRPA's Scheme Deprives Mrs. Suitum Her Property Rights in a Manner that is Unfair Both Procedurally and in Appearance.

In *Williamson County,* Justice Stevens wrote in concurrence:

> "The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations.... *[A]s long as fair procedures are followed,* I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a "taking" of private property." 473 U.S. at 205 (Stevens, J., concurring) (emphasis supplied).

In marked contrast, unfair procedures mar the focal TDR scheme. TRPA has imposed a "regulation ... so onerous

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(..continued)
tutional law." *See Coniston Corp. v. Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988)).

that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County,* 473 U.S. at 200.

To preserve the notion of "fundamental fairness" *Solesbee v. Balkcom,* 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) inherent to due process, rational procedures must be employed whenever the government deprives an individual of a property interest. *See, e.g., Lindsey v. Normet,* 405 U.S. 56 (1972) (recognizing tenant's property interest in suit seeking to prevent imminent state-enforced eviction); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) (procedural due process violated by statutory provisions for triennial judicial settlement of trust estate accounts, because an inadequate method of notification denied some beneficiaries the opportunity to participate in control of their property); *Pennoyer v. Neff,* 95 U.S. (5 Otto) 714 (1878) (addressing issues of personal jurisdiction and procedural due process to recover possession of tract of real property), *overruled on other grounds, International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

Above all, procedures impinging on Mrs. Suitum's property rights must at least *appear* fair, to instill in her the confidence that TRPA equitably considered her situation. "[A]part from avoiding the risk of actual error, this Court has stressed the importance of adopting procedures that preserve the appearance of fairness and the confidence of [individuals] in the decisionmaking process." *Greenholtz v. Inmates of Neb. Penal and Correctional Complex,* 442 U.S. 1, 34, 35 (1979) (Marshall, J., dissenting in part) (due process contemplates "the need to assure the appearance, as well as the existence, of fair-



ness"). *See also Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980) (procedures that deprive life, liberty or property must boast "the appearance and reality of fairness, to 'generate[] the feeling, so important to a popular government, that justice has been done' "; citation omitted).

In this regard, TRPA's actions should be carefully scrutinized. Government conduct at the local level has been considered particularly rife with potential to abrogate due process. "It is probably true that 'the most significant feature of small town politics is the frequency with which legal and procedural requirements are overlooked and ignored....so as to take account of unique conditions;' such '[p]ersonalized government even at the local level can be as offensive as it may be intimate and effective...." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-1 at 630 (2d ed. 1988) (quoting WOOD, SUBURBIA 278-80 (1958)).

### B. TRPA's TDR Scheme Does Not Provide Meaningful Postdeprivation Process.

The "Constitution is satisfied by the provision of meaningful postdeprivation process" such as, in the takings context, eminent domain proceedings under state law. *Williamson County,* 473 U.S. at 195. *See also Parratt v. Taylor,* 451 U.S. 527, 539 (1981) ("the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process"), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986).[10] Here, eminent domain proceedings are not

[10] The Court relied on *Parratt* in its discussion on postdeprivation process in *Williamson County,* 473 U.S. at 195.

at issue (*see supra* note 4). TRPA has decided Mrs. Suitum cannot build on her SEZ property at all (*i.e.*, the "initial taking"), and the TDR scheme at issue does not afford her "meaningful postdeprivation process" because: (1) it requires Mrs. Suitum to consummate a sale, that may never occur, with some unknown third party purchaser regarding some unidentified plot of land; (2) it created Mrs. Suitum's development rights in the first instance in an arbitrary manner; and (3) like a physical taking, it treads too heavily on Mrs. Suitum's property rights by *forcing* her to sell them. At the very least, the TDR scheme at issue strains the outer limits of due process because it lacks even the basic appearance of fairness.

***1. Mrs. Suitum Must Sell Her Rights to an Unknown Purchaser for an Unidentified Parcel.*** Former Chief Judge Breitel of the New York Court of Appeals struck down a TDR program similar to TRPA's, as applied to real estate in midtown Manhattan:

> In an attempt to preserve the rights they were severed from the real property and made transferable to another section of mid-Manhattan in the city, *but not to any particular parcel or place.* There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. *But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action.*



*Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 597-98, 350 N.E.2d 381, 387-88, 385 N.Y.S.2d 5, 11, *cert. denied*, 429 U.S. 990 (1976).

Similar flaws hamper TRPA's TDR scheme. Unlike other TDR programs that have met judicial endorsement,[11] no receiving properties or purchasers have been identified with any specificity sufficient to deny Mrs.

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[11] *See, e.g., Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 328, 334, 366 N.E.2d 1271, 1273, 1277, 397 N.Y.S.2d 914, 916, 920 (1977) (opinion by Chief Judge Breitel) (severable air rights transferable to eight identified receiving parcels, several of which had already been owned by the same developer, and already found suitable for the construction of new office buildings), *aff'd*, 438 U.S. 104, 137 (1978); *West Montgomery County Citizens Ass'n v. Maryland-National Capital Park and Planning Comm'n*, 309 Md. 183, 188-89, 191, 522 A.2d 1328, 1330-31, 1332 (1987) (zoning text established "receiving zones" for development rights, and master plan created 27 TDR receiving areas, with defined boundaries and assigned density increase limitations; however, designation of specific receiving areas and densities struck on procedural grounds, because they were not located on the zoning map but on the master plan).

Suitum's property *with* due process. TRPA places her at the mercy of market trends, entirely beyond her control. The Agency (incorrectly) insists that, before her takings claim ripens, she *must* locate a purchaser, even if she is forced to sell her rights at bargain-basement prices during a depressed real estate cycle.

Moreover, assuming Mrs. Suitum can find a *ready and willing* TDR buyer, he must also be *able* to use those rights. Before Mrs. Suitum's sale can be consummated, the unidentified purchaser must submit to TRPA's zoning procedures to determine *his own* eligibility to use the TDRs. In other words, Mrs. Suitum's due process in selling her property rights depends *on someone else's process* in determining his eligibility to use them. Her Fourteenth Amendment guarantees hinge on an anonymous purchaser's ability to successfully negotiate TRPA's land use labyrinth. [12]

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[12] In *San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621 (1981), Justice Brennan, in dissent, criticized the *Fred F. French* decision because it adopted Justice Brandeis' view that the proper and sole remedy for a regulatory taking was invalidation of the regulation, not the payment of compensation. 450 U.S. at 649 n. 14 (Brennan, J., dissenting); *cf. Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 417-18 (1922) (Brandeis, J., dissenting). In his criticism of *Fred F. French,* however, Justice Brennan did not challenge Chief Judge Breitel's reasoned analysis of New York City's TDR scheme. While the *amici* agree with Justice Brennan's conclusion that just compensation is the appropriate remedy when a regulation "goes too far" *as a taking,* we also believe that Chief Judge Breitel's criticism of the defective process in *Fred F. French* is correct, and further note that the Court upheld his findings on the much fairer TDR regime in *Penn Central.* However, "[t]he *remedy* for a regulation that goes too far, *under a due process theory,* is ... invalidation of the regulation, and, if appropriate, actual damages." *Williamson County,* 473 U.S. at 198 (emphasis supplied).



By mandating a TDR sale before it can allegedly value Mrs. Suitum's property, TRPA has improperly exercised its police power to achieve "what constitutionally can be accomplished only through the exercise of eminent domain." *Williamson County,* 473 U.S. at 199 (interpreting opinions of Justice Holmes including, *inter alia, Pennsylvania Coal,* 260 U.S. at 413). Rather than proceeding, as the Constitution requires, by eminent domain and purchasing Mrs. Suitum's property itself, TRPA is forcing her to find a private party to acquire whatever rights she possesses through a defective TDR process. Accordingly, TRPA has assumed the convenient position of both player *and* referee.

***2. TRPA has Created Mrs. Suitum's TDRs in an Arbitrary Manner.*** Whether a property right exists is a question of state law. *See, e.g., Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) ("state law is the source of those strands that constitute a property owner's bundle of property rights"). However, a state cannot create or deny those property rights in an arbitrary manner anathemic to due process. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541 (1985) (once a state has created a property right, the federal Constitution answers remaining questions regarding what process is due); *Bishop v. Wood,* 426 U.S. 341, 344, 347 (1976) (Fourteenth Amendment Due Process Clause protects state-created property interest in public employment). TRPA has decided that Mrs. Suitum's rights to transfer development are interests that run with her land. However, the Agency has created these TDRs irrationally, without correlation to offset the severe development restrictions placed on her parcel.

(a) Development Allocations. One of the rights TRPA has created is a "development allocation." A property owner needs one allocation for every residential unit she plans to build. The county in which a parcel is located serves as a clearinghouse for obtaining allocations, as they do not automatically attach to a piece of land. In Mrs. Suitum's county, 6 of its 60 annual allocations are reserved for parcels in a SEZ or other zone where development is prohibited. To obtain one of these 6 allocations, *Mrs. Suitum must enter and win a lottery. See* Affidavit of Lyn Barnett, ¶¶ 10, 11, CR 74. Odds at winning presumably vary from year to year, depending on the universe of participants. Accordingly, one of the "sticks" in Mrs. Suitum's TDR "bundle" rests entirely on luck. Due process should not countenance TRPA's game of chance.

(b) Residential Development Rights. Each vacant residential parcel automatically receives one residential development right. As a consolation prize, Mrs. Suitum receives three "bonus units" because her undeveloped property falls in a SEZ; she can thus sell a total of four development rights to a builder of a multi-unit project (if one can be found). *See* TRPA Code §§ 35.2.C, 35.2.D(4)(b); App. F-10-11. A scheme premised on "bonus units," created by a property owner's misfortune in owning a lot decreed off-limits to development, smacks of unfairness. It *appears* arbitrary. Surely this system does little to restore Mrs. Suitum's confidence in TRPA's land use planning methods.

(c) Land Coverage. Each lot has a percentage of allowable "base coverage" depending on that parcel's classification. This area can be sold for additional "land



coverage" to a TDR purchaser. Under this regime, Mrs. Suitum can sell 183 square feet of base coverage. Her property rights are ascertained simplistically because her lot occupies 18,300 square feet; in a SEZ, base coverage is *automatically* 1% of lot size, and 99% of the area is *automatically* not for sale. *See* TRPA Code §§ 20.3.A; App. F-1. To determine Mrs. Suitum's saleable property rights, TRPA has not made even the slightest effort to carry its burden in assessing the environmental impacts that development on her property would occasion. The Court has instructed, however, that zoning bodies must "make an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan v. Tigard,* 512 U.S. ---, 114 S.Ct. 2309, 2319-20 (1994) (city bears burden to show that regulation is "roughly proportional" to project impacts). Such a determination would not be an overly difficult task for TRPA. Mrs. Suitum's lot is in a residential subdivision and is surrounded by houses on three sides. (A paved street borders the fourth side.) Data on environmental impacts from these homes could be easily ascertained, and is a small price to pay to safeguard Mrs. Suitum's due process rights.

***3. TRPA's Scheme As Applied to Mrs. Suitum Approaches a Physical Taking, Because it Forces the Sale of Her Property Rights Before They can Allegedly be Valued.*** The district court recognized that "the only avenue not yet pursued" by Mrs. Suitum is selling her development rights. App. C at 2. The Ninth Circuit confirmed: "Without attempting to transfer the rights she possesses, Suitum cannot know ... the regulation's full economic impact ...." *Suitum,* 80 F.3d at 362; App. A-9.

The *amici* seriously dispute that Mrs. Suitum's property can only be valued by reference to a TDR sale. In any event, TRPA has convinced the lower courts that, if Mrs. Suitum wants to know the worth of her property, she *must* sell her rights in it to some anonymous private purchaser. This genre of forced sale is markedly different from a variance, waiver or other permit-type process. Those procedures simply ask a government body to determine permissible land uses. They do not mandate that a landowner traffic her land to quantify investment-backed expectations.

In this regard, TRPA's TDR scheme as applied to Mrs. Suitum's property fairly resembles a physical taking. The Court recognizes that the "element of required acquiescence is at the heart of the concept of [*per se* takings]." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (statute *required* landlords to submit to installation of cables and switching boxes). Hence, the "character of the government action" is the determinative factor in the *per se* takings calculus. *Loretto*, 458 U.S. at 426. Any government regime that *forces* someone to sell property rights to a private party, before such rights can allegedly be valued, is "a property restriction of unusually serious character," *id.*, and, without more, should yield a ripe takings claim.[13]

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[13]The character of TRPA's impact on Mrs. Suitum's rights rivals in severity those situations where a *per se* taking was found. *See, e.g., Loretto*, 458 U.S. at 438 n. 16 (cable box invades 1½ cubic feet of space). Moreover, in physical takings cases, the Court does not require an actual intrusion as such, but the practical equivalent to one. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 180



The Ninth Circuit considered the takings ripeness requirement in *Azul Pacifico, Inc., v. Los Angeles*, 948 F.2d 575 (9th Cir. 1991), *cert. denied*, 506 U.S. 1081 (1993). It decided that a final decision *always* exists for ripeness purposes where there is a physical invasion of property. Such a "'taking occurs at once, and nothing the city can do or say after that point will change that fact'.... Because a physical invasion is itself a final government action, the ... *Williamson* ripeness requirement [for a final decision] is always satisfied in such cases.'" *Id.* at 579 (citation omitted).

This is the precise situation here. As in *Azul Pacifico*, TRPA's severe impingement on Mrs. Suitum's property interests are manifest and need not be evidenced by any proof other than the regulation's application to her plot. There is nothing TRPA, or this Court, can say or do at this point to mitigate the facts that: (1) Mrs. Suitum's land is in a SEZ; (2) she can never build a house (or anything else) on her plot; (3) 99% of her lot's coverage is rendered valueless; and (4) she is now forced to sell whatever property rights she has before they can purportedly be

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(..continued)
(1979) (imposition of navigation servitude did not physically expropriate private property, but invited trespassers to so intrude; "even if the Government physically invades only an easement in property, it must ... pay compensation"); *United States v. Causby*, 328 U.S. 256, 261 (1946) (plane flights in airspace overhead private property constituted a compensable taking; invasion was "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it").

valued.[14] *See also Loretto,* 458 U.S. at 437-38 (whether a *per se* taking has occurred "presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute").

Moreover, if Mrs. Suitum executes a TDR sale, she must record "deed restrictions, or other covenants running with the land, permanently assuring" that her plat remains in a natural state. TRPA Code § 20.3.C(7)(a)(iii).[15] Such deed restrictions work a "practical ouster of possession." *Northern Transp. Co. v. Chicago,* 99 U.S. 635, 642 (1879). They "effectually and permanently dispossess [Mrs. Suitum] as if [they] had destroyed that amount of ground." *See St. Louis v. Western Union Telegraph Co.,* 148 U.S. 92, 99 (1893) (placement of telegraph poles by telegraph company on city's public streets). The fact that Mrs. Suitum may retain "bare legal title" is of no moment. The mandated deed restrictions "empty the right of any value, since the purchaser [of the *land*] will also be unable to make any use of the property." *Loretto,* 458 U.S. at

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[14]Certainly government regulation that forces vending of the *actual* real estate owned by a private person, to another private person, would ripen a takings claim. There is no meaningful distinction between this scenario and TRPA's mandate for a sale of *rights* in the actual land.

[15]In *Loretto,* the Court remarked that a physical taking "forever denies the owner any power to control the use of the property; he not only cannot exclude others, but he can make no nonpossessory use of the property." 458 U.S. at 436. Here, Mrs. Suitum also lacks the ability to control land uses *on* her property because of the deed restrictions she must record. Moreover, a nonpossessory "use" is the *only* "use" to which she can avail herself: Mrs. Suitum *must sell her rights,* and she cannot build *anything* on her land.



436. "[F]orcing someone to stop doing things with his property—telling him 'you can keep it, but you can't use it'—is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." TRIBE, § 9-3 at 593.

To summarize, TRPA compels Mrs. Suitum to sell her rights, which will inevitably leave 99% of her land with no value, and she must record restrictive covenants so that no part of her property can ever be developed. These final steps formalize what TRPA has already decided: namely, that her land is part of a SEZ and is not conducive to any construction. She has no option but to abide by these mandates. Her claim is ripe *per se* because these injuries, inflicted upon her by TRPA's TDR scheme, patently deprive her property rights without due process.

## III. CONCLUSION

A. Mrs. Suitum's takings claim is ripe because there is no adjudicative decision that TRPA, or any other agency, must render to further ascertain the degree of allowable land uses. It is a foregone conclusion that Mrs. Suitum's plot is entirely undevelopable. A TDR sale, if one can be consummated, provides no additional opportunity for TRPA's adjudication on permissible development. Nor would a TDR sale change the result that Mrs. Suitum can market only 1% of her plot's coverage.

B. Mrs. Suitum's claim that TRPA has "gone too far" is ripe because the Agency has invalidly exercised its police power in a manner depriving her property without due process. TRPA created her TDRs in an arbitrary manner in the first instance. It has then forced upon her

an irrational procedure through which she must sell her gossamer rights, thereby shunning exercise of its eminent domain power.

November 26, 1996

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

*Petitioner,*

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

## BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

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## BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

### INTEREST OF AMICUS CURIAE

Amicus Tahoe Lakefront Owners' Association (TLOA), incorporated as Shorezone Property Owners Association, Inc., is a nonprofit Nevada Corporation. Most of TLOA's members own lakefront property on Lake Tahoe in California or Nevada, although ownership of lakefront property is not required for membership. TLOA monitors and advises regulatory bodies, such as respondent Tahoe Regional Planning Agency (TRPA), on issues of planning and regulation of recreational and residential facilities on property located along the shore of Lake Tahoe.

It is TLOA's position that the transfer of development rights program (TDRP) created by TRPA is nothing more than a scheme allowing government to avoid its duty to compensate landowners for overregulation of their property. TLOA believes that the TDRP deprives property owners of their constitutional right to due process and, therefore, sale of development rights under that program cannot serve as a barrier to landowners with valid claims under the Fifth Amendment to the United States Constitution.

All parties have consented to the filing of this brief and their written consent has been lodged with the clerk of this Court.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 359 (9th Cir. 1996).

## STATEMENT OF THE CASE

The case presents the issue of whether transferable development rights must be sold before a landowner may bring a takings claim under the Fifth Amendment to the United States Constitution.

In 1989 respondent TRPA rejected Bernadine Suitum's plans to build a residence on an 18,300 square foot parcel of land located in a residential area of Incline Village, Nevada. Although Ms. Suitum's land is surrounded by development, TRPA determined that the land can never be developed because it is located in a Stream Environment Zone (SEZ) which purportedly provides surface water conveyance from upland areas into Lake Tahoe.

TRPA's TDRP allows Ms. Suitum to transfer to the owner of a development-eligible lot a residential development allocation (if Ms. Suitum could acquire one from the county by lottery) (Tahoe Regional Planning Agency Code of Ordinances (TRPA Code) §§ 34.3.A and 34.3.D), residential development rights (TRPA Code § 34.2.A), and additional land coverage for the transferee's property (TRPA Code § 20.3.C(2)(c)). In exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to



keep the land forever in its natural state. TRPA Code §§ 20.3.C(7)(a), 34.2.B, 34.3.G, and 34.5.B.

Ms. Suitum did not attempt to sell the transferable development rights (TDRs) attaching to her property. Instead, Ms. Suitum filed an action in the United States District Court, District of Nevada, asserting that restrictions imposed by TRPA on the use of her property amounted to a taking of private property for public use without just compensation and a violation of civil rights. The District Court, ruling on TRPA's motion for summary judgment, acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred to the property at issue." Nevertheless, the District Court held that because Ms. Suitum has not applied to transfer development rights created by TRPA, her claims are not ripe for judicial review.

The Ninth Circuit Court of Appeals upheld the District Court's decision. The decision allows government to create an intricate system of sham property rights which effectively precludes landowners from bringing claims seeking just compensation for public use of their property. The decision creates an unfortunate precedent regarding the role of TDRs in a takings action.

## SUMMARY OF ARGUMENT

TRPA's TDRP violates due process standards because the program forces the owner of property in an SEZ to essentially quitclaim property rights in exchange for a fraction of the value of the property, fails to provide a ready market for TDRs, and lacks a substantial relationship to the objective sought by initial development restrictions on properties to which development rights can be transferred. An unconstitutional TDRP cannot preclude a takings action.

TRPA reached a final decision regarding development of Ms. Suitum's property, and the lack of a ready market for TDRs makes any attempt to transfer the development rights on Ms. Suitum's property futile. Ms. Suitum's case is ripe for judicial determination.

The Ninth and Seventh Circuit Courts of Appeals have adopted conflicting approaches to determining ripeness questions under ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172 (1985). The Seventh Circuit follows precedent holding that, when determining whether a case is ripe, a court must evaluate the hardship to the parties of delaying court consideration. The Ninth Circuit did not consider the hardship Ms. Suitum would suffer if required to transfer development rights assigned to her property.

## ARGUMENT

### I

### THE TRANSFER OF DEVELOPMENT RIGHTS PROGRAM IS UNCONSTITUTIONAL; THUS, PARTICIPATION IN THAT PROGRAM CANNOT SERVE AS A PREREQUISITE TO A TAKINGS CLAIM

TRPA's determination that Ms. Suitum's property is located in an SEZ precludes any development on her property. The right to build a home on one's own property, particularly when that property is located in an established subdivision, is a property right within the meaning of the Fifth Amendment to the United States Constitution. ***Nollan v. California Coastal Commission***, 483 U.S. 825, 845 n.2 (1987).[1] Deprivation of such a property interest compels due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.



Due process limits government action by preventing enforcement of unreasonable, arbitrary or capricious laws, and by requiring a substantial relation between government action and the objective sought to be attained. ***Pruneyard Shopping Center v. Robins***, 447 U.S. 74, 85 (1980). The TDRP created by TRPA does not meet those standards.

TRPA's TDRP is unreasonable, arbitrary, and capricious because it requires the owner of property in an SEZ to essentially quitclaim property rights in exchange for a fraction of the value of the property. If Ms. Suitum sells the TDRs on her property, she will have to agree to keep her land forever in its natural state. TRPA provided evidence, accepted by the Court of Appeals, that Ms. Suitum's TDRs are valued between $10,000 and $30,000. ***Suitum v. Tahoe Regional Planning Agency***, 80 F.3d 359, 363 (9th Cir. 1996). The purported value of the TDRs bears no relation to the actual value of Ms. Suitum's property.

Transfer of development rights schemes in general are unreasonable, arbitrary, and capricious. Such schemes are inherently unreliable because they depend on market factors beyond government's control, ***i.e.***, the strength or weakness of the economy and the real estate market. In ***Fred F. French Investment Co., Inc. v. City of New York***, 350 N.E.2d 381 (N.Y. App.), ***reargument denied***, 356 N.E.2d 491, ***appeal dismissed, cert. denied***, 429 U.S. 990 (1976), the court explained some of the problems associated with TDRs.

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[1] In ***Lucas v. South Carolina Coastal Council***, 505 U.S. 1003, 1031 (1992), this Court noted that "erection of any habitable or productive improvements" on one's land is an "'essential use'" of land (citation omitted).

"[T]he development rights of the parks were not nullified by the city's action. In an attempt to preserve the rights they were severed from the real property and made transferable to another section of mid-Manhattan in the city, but not to any particular parcel or place. There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. The acceptance of this contingency-ridden arrangement, however, was mandatory under the amendment.

"The problem with this arrangement ... is that it fails to assure preservation



> of the very real economic value of the development rights as they existed when still attached to the underlying property. By compelling the owner to enter an unpredictable real estate market to find a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed." *Id.*, 350 N.E.2d at 387-88 (citations omitted).

TRPA's TDRP is not substantially related to the objective sought to be obtained by TRPA. The March 30, 1994, Order of the District Court states that the TDRP created by TRPA was designed to provide relief to owners of property in the SEZ. Even if that is so, in practice the program does not assist property owners prohibited from developing their properties. The program provides no ready market for the sale of TDRs and does nothing to ensure that property owners who are able to sell TDRs obtain a value commensurate with the value of the property.

The TDRP also lacks a substantial relationship to the objective sought to be obtained by restricting development on those properties to which development rights can be transferred. The TDRP allows an owner of totally restricted property to transfer the development rights that owner has been denied to another property owner whose property has been restricted to a lesser degree. Thus, the TDRP allows owners of development-eligible property to exceed an initial development limitation presumably imposed for a legitimate purpose. If the original development restriction is too stringent, the limitation should be adjusted upward as a right without requiring a property owner to pay for the adjustment. On the other hand, if the original development restriction,

imposed by a public entity, is necessary to achieve a compelling public interest, there is no justification for allowing one private property owner to evade that restriction by paying money to another private property owner. *See* Michael D. Strugar, ***Transferable Development Rights: Robbing Peter to Pay Paul?***, 62 U. Det. L. Rev. 633, 645-46 (1985).

TRPA's TDRP is simply a scheme by which TRPA avoids compensating overregulated property owners. This Court held, in ***Lucas v. South Carolina Coastal Council***, 505 U.S. at 1015-16, that a regulation which "denies all economically beneficial or productive use of land" amounts to a categorical taking. This per se rule is particularly appropriate where land is required to be left in its natural state. ***Id.*** at 1018.

TRPA requires that land within the SEZ be left in its natural state. The ***Lucas*** decision provides a clear-cut basis for determining that TRPA's placement of property in an SEZ constitutes a taking and entitles the property owner to just compensation. Instead, the Court of Appeals' decision insulates TRPA from compensating owners of property falling within the SEZ. Those property owners must attempt to sell TDRs in a highly speculative market. Owners of development-eligible property are forced to purchase property rights which they would have had but for TRPA's actions.[2]

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[2] TRPA's program limiting development of property outside the SEZ and allowing landowners to circumvent those limitations by purchasing TDRs fails to meet standards clearly articulated by this Court. *See*, ***Nollan v. California Coastal Commission***, 483 U.S. at 837 (there must be a nexus between government action and the end advanced as the justification for the action); ***Dolan v. City of Tigard***, 512 U.S. __, 129 L. Ed. 2d 304, 320 (1994) (a public entity "must make some sort of individualized (continued)



This compensation avoidance scheme may advance government's interest in saving money, but it does nothing to serve landowners under TRPA's jurisdiction.

A regulatory scheme designed as a ruse to avoid paying full condemnation damages is a clear violation of the due process rights of landowners affected by the program. A landowner is not required to follow procedures set forth in an unfair and unconstitutional program in order to obtain the final decision required for a takings claim to be ripe. ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. at 205-06; ***MacDonald, Sommer & Frates v. Yolo County***, 477 U.S. 340, 350 n.7 (1986).

## II

## *WILLIAMSON COUNTY* DOES NOT REQUIRE THAT A LANDOWNER PURSUE FUTILE ACTIONS TO ESTABLISH THAT A TAKINGS CLAIM IS RIPE

A constitutional challenge to a land use regulation is ripe only after a landowner has received a final decision from the government agency charged with implementing the regulation. ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. at 186. This requirement assures that a government agency has every opportunity to allow development of the particular property in question before a case is adjudicated. ***Hodel v. Virginia Surface Mining and Reclamation Association, Inc.***, 452 U.S. 264, 297 (1981). A landowner must apply and reapply to develop a piece of property until it is clear no development of the property will be allowed. ***MacDonald, Sommer & Frates v. County of Yolo***, 477 U.S. at 351-52. However, such actions may be excused where further attempts to obtain acceptance of a development proposal

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determination that the required dedication is related both in nature and extent to the proposed development's impact").

would be futile. ***Hoehne v. County of San Benito***, 870 F.2d 529, 534 (9th Cir. 1989).

The question of whether a final decision has been rendered by a government agency is one of fact to be determined on a case-by-case basis.

> "Fortunately for the federal courts, the solution to this problem [whether a final decision has been reached] is not achieved by color-matching putative precedents and comparing snippets from stated rationales contained in past cases. As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and [the Ninth Circuit Court of Appeals] are extremely fact-specific. Only the facts tell us whether a final decision had been reached." ***Id.*** at 533.

The facts of Ms. Suitum's case reveal that TRPA reached a final decision regarding development of Ms. Suitum's property. Ms. Suitum is prohibited from pursuing any development of her property. TRPA Code § 20.4. The Ninth Circuit determined that Ms. Suitum must submit an application for the transfer of development rights before her takings claim is ripe. ***Suitum v. Tahoe Regional Planning Agency***, 80 F.3d 359 at 364. The required application to TRPA is an approval form for the actual transfer to the receiving parcel which must already be identified. ***See*** Transfer Approval Form.

It would be futile for Ms. Suitum to attempt to transfer the development rights created by TRPA because there is no ready market for those rights. ***See*** argument in Section I above. A final decision has been rendered in this case, and



Ms. Suitum should be allowed to litigate the substantive issues of her case.

## III

## THE NINTH AND SEVENTH CIRCUITS HAVE ADOPTED INCONSISTENT APPROACHES TO DETERMINING WHETHER A CASE IS RIPE UNDER *WILLIAMSON COUNTY*

The Seventh Circuit Court of Appeals, in ***Marusic Liquors, Inc. v. Daley***, 55 F.3d 258, 260-61 (7th Cir. 1995), held that the owner of a liquor store did not have to try to sell his business before bringing an action to challenge an ordinance restricting the transfer of liquor licenses. The court determined that the final decision ripeness doctrine, as described in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, was satisfied.

In **Marusic Liquors**, the Seventh Circuit Court of Appeals determined that the immediate effects of the ordinance in question would result in "costs" similar to those which have led courts to deem disputes ripe. **Marusic Liquors, Inc. v. Daley**, 55 F.3d at 261. Cases cited by the Seventh Circuit examined the hardship to the parties if judicial action is postponed. ***See Abbott Laboratories v. Gardner***, 387 U.S. 136, 148-49 (1967) (a court must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration when determining whether a case is ripe for judicial resolution); ***Triple G Landfills, Inc. v. Board of Commissioners of Fountain County, Indiana***, 977 F.2d 287, 289 (7th Cir. 1992) (the court reviewed the scope and practical effect of the ordinance in question to determine hardship to the parties resulting from delay of judicial review.).

The Ninth Circuit Court of Appeals did not examine the hardship Ms. Suitum would suffer if required to transfer

development rights. As discussed above, in exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to keep the land forever in its natural state. Ms. Suitum would have to prematurely quitclaim her property rights in exchange for a fraction of the value of the property. This would create a tremendous hardship because TRPA's regulations creating the SEZ, as applied to Ms. Suitum's property, have effectively taken her property without compensation.

This conflict between the Seventh and Ninth Circuits should be resolved in accordance with precedents requiring a court to examine the hardship to the parties if judicial review is delayed.

## CONCLUSION

This Court has not directly addressed the issue of the legality of TDR schemes. The TDRP adopted by TRPA provides clear evidence of the inherent unfairness of such schemes. An unfair law cannot provide the basis for denial of the right to bring an action against government for compensation resulting from overregulation of private property.



For this reason, and the reasons set forth above, amicus respectfully requests that this Court reverse the decision of the court below.

DATED: November 25, 1996.

Respectfully submitted,

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(12)

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In The

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

*Petitioner,*

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

**On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit**

## BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute for Justice is to strengthen the ability of individuals to control and transfer property and to demonstrate that property rights are inextricably connected with other civil rights.

Although the question in this case specifically addresses the ripeness doctrine, the case also presents larger issues involving private property rights and the proper scope of administrative processes in a free society. The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago School of Law, one of the nation's leading authorities on property law.

The Institute for Justice has obtained the consent of the parties to filing this brief and letters of consent have been filed with the Clerk.

## STATEMENT OF FACTS

Bernadine Suitum owns an ordinary residential lot of 18,300 square feet. She and her late husband bought the property in 1972. The lot's size would support construction of a single-family home indistinguishable from those of her more fortunate neighbors who already have built their homes. But her development rights have been sharply regulated and curtailed by the Tahoe Regional Planning Agency (TRPA). Pursuant to its comprehensive planning ordinance, TRPA has deprived Ms. Suitum for all time of the right to build on her land. In exchange, the State of Nevada, under the Tahoe Basin Act, appears ready to negotiate the purchase of the lands so encumbered for a sum estimated at $35,000. *See* Johnson Suppl. Aff. ¶ 12. Although the record is not clear on the point, a buildable lot appears to be worth far more money.

Alternatively, TRPA allows Ms. Suitum to sell, separately or in combination, two remnants of her fee simple ownership. First, she may sell her land, but subject to the same development constraints – assuming she can find a buyer. Second, she may sell a set of transferable development rights (TDRs) to some other person within the planning region for a fraction of the value of her own lot as a building site. It appears from the record that the combined value of these two rights is less than that of her land as a buildable lot.

TRPA denies that its elimination of Ms. Suitum's right to develop her own land constitutes a compensable taking under the Fifth Amendment to the United States Constitution. Indeed, it denies that the case is even ripe for adjudication in federal court. That decision is incorrect on both the procedural and substantive aspects of the case. The purpose of this *amicus curiae* brief is to expose the constitutional infirmities of TRPA's decision.

Some brief background helps place this case in perspective. In 1987, TRPA inaugurated a comprehensive plan to regulate, and often prohibit, new construction within its planning region. Each plot within the area was assessed for its ostensible suitability for construction under an elaborate set of criteria. Under this complex scheme, TRPA has created Stream Environment Zones (SEZs) which cover those lands that are located near the stream that feeds Lake Tahoe. Land located in these zones is not eligible for new private construction under any circumstances. The decision is categorical and does not depend on any individualized showing that the proposed plan of construction would interfere with the drainage within the region.

Under TRPA's general plan, however, an owner, such as Ms. Suitum, who is denied all right to build on her own land receives in exchange either:

(1) an alleged willingness on the part of some government entity to buy the land for less than its fair market value as a buildable lot, or;



(2) a package of residential development rights, land coverage rights; and residential allocations.

All of the elements of the package listed as the second option are TDRs, the combined value of which appears to be worth less than a buildable lot. These rights may be transferred *if* the owner can find a buyer. That buyer, however, does not receive any automatic right to build either, as the completed transfer is subject to approval which will only be granted if certain requirements on use and density are met. TRPA does not organize this resale market, but leaves it for holders of TDRs to fend for themselves. Some sales are reported of these development rights for sums that range between $1,500 to $6,000, and building allocations for between $17,000 and $25,000. *See* Johnson Suppl. Aff. ¶ 13. There is no mention of how long it takes to sell a TDR or of the expenses incurred in the sale.

TRPA determined that Ms. Suitum's land was located within an SEZ, precluding all development. Therefore, she was left with the unbuildable lot coupled with a residential development right and land coverage right equal to 183 square feet, or one percent of the surface area of her own land. She has not tried to sell any of these development rights, but instead brought an action in federal court arguing that the net effect of the regulations deprived her of all economically viable use of her land, thus constituting a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. In an unreported decision, the United States District Court for the District of Nevada granted TRPA summary judgment, ruling that the issue was not ripe. This ruling was affirmed in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996).

## SUMMARY OF ARGUMENT

This case raises the fundamental question of whether planning authorities can engage in a series of maneuvers that will render it impossible for landowners who have suffered regulatory takings to ever recover full and perfect compensation for their loss guaranteed under the Fifth Amendment to the United States Constitution. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). From the time of Shakespeare to the present, it has been well understood that justice delayed is justice denied. TRPA demonstrates the modern truth of Shakespeare's maxim through its scheme of regulation that makes it well-nigh impossible for any court to review TRPA's confiscatory regulations. Seizing on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), TRPA consciously has placed obstacle after obstacle in the path of ordinary landowners of limited means who desire no more than to build a house similar in kind and nature to that of their neighbors.

In many situations involving property regulation, the due process clause is violated because too little process has been given to an owner. But in this case the vice is exactly the opposite: not too little process, but too much. Grant Gilmore concluded his famous Storrs Lectures with words that could have been written with this case in mind: "Law reflects but in no sense determines the moral worth of a society. A reasonably just society will reflect its values in a reasonably just law. . . . An unjust society will reflect its values in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." Grant Gilmore, *The Age of Anxiety*, 84 Yale L.J. 1022, 1044 (1975).

. Landowners like Ms. Suitum suffer from a process whose elaborate uncertainty denies any means of vindicating constitutional rights. The landowners' plight



stems directly from the finality rules erected by this Court in *Williamson*. Local governments and regional planning authorities know that so long as they have made no final judgment their conduct will not be reviewed in federal court. Not surprisingly, TRPA seeks to indefinitely expand this period of delay. To do so, it has developed a complex system whereby it fractionates the development rights associated with an ordinary parcel of land into a number of separate components. Ms. Suitum did not apply to transfer her residential development right or available land coverage right under the program. Those tasks require multiple forms and complicated negotiations with other private parties before sale, assuming they can be found. The costs of going through these maneuvers could easily chew up much of the value of her rights and might exceed their value in some cases.

TRPA throws the entire burden of this uncertainty on Ms. Suitum and then seizes on this very uncertainty and resulting delay to bar the door to the federal courthouse. This Court should not extend the ripeness requirement of *Williamson* to require additional private negotiations that have nothing to do with the intrinsic use or value of the land, and everything to do with concealing the paltry and thoroughly inadequate compensation that a governmental entity may offer for a formerly buildable lot.

TRPA has made its final offer, and, as a matter of law, that offer does not satisfy the constitutional requirements of just compensation. TRPA has already decreed that Ms. Suitum will never make any actual use of her land. Nonetheless, TRPA contends, and the Ninth Circuit agreed, that she still can make two valuable "uses" of her land. The first "use" is to sell the land to an adjacent owner who could annex that land to his own parcel. The second "use" is to apply for and sell TRPA's package of transferable development rights. These propositions confuse an owner's right to use her own property with the owner's

obligation to sell it in order to minimize the state's constitutional duty to provide just compensation for the state-imposed restrictions.

TRPA is not so brazen as to claim that no compensation will be offered. Instead it offers compensation in the form of TDRs which are difficult to value under any circumstances, and whose value falls far short of the "full and perfect compensation in money for the property taken" necessary to make the holder of property indifferent between the land that was lost and the compensation received in exchange. *See United States v. Miller*, 317 U.S. 369, 373 (1943).

The simple and just solution to all these problems is for TRPA to buy the land for fair market value and resell it, or its associated development rights, as it pleases. TRPA should not be allowed to hide its unconstitutional tactics behind the ripeness doctrine. Once Ms. Suitum's right to build is denied, her claim to compensation is perfected so that it becomes the duty of TRPA to pay in cash, or in cash equivalents, the requisite constitutional amount – namely, the fair market value of the plot of whose use she has been deprived. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-26 (1893). TRPA's deliberate effort to inject massive uncertainty into the compensation question should not become a royal road to avoid compensation altogether.



## ARGUMENT

### I. THE DECISION OF TRPA WAS FINAL AND RIPE FOR ADJUDICATION THE MOMENT IT DENIED MS. SUITUM ANY RIGHT TO DEVELOP HER OWN LAND.

This Court has created a ripeness requirement in takings cases in order to make sure that cases not ready for complete disposition are kept out of the federal courts. The impulse behind the ripeness doctrine is one of judicial economy. Where money will compensate an individual for economic losses, there is little danger in deferring judicial consideration of the matter until all administrative rulings have been made. By waiting until that moment, the controversy may well disappear, and if it does not, all aspects of the case can be resolved in a single proceeding, with enhanced judicial efficiency and reliability.

Administrative efficiency is, however, only one element of the proper judicial calculus. Preservation of constitutional rights surely is another. Access to courts offers vital protection in our system of constitutional government with its explicit limitations on the power the state may exert over its citizens. The ripeness requirement in *Williamson* relieves the state of the obligation to pay compensation in a particular case until the transaction itself has been closed in order to reduce the stress on the court system, as discussed *infra* at 9-11. But postponing access to the courts until the entire matter can be resolved in a comprehensive fashion increases the risk that redress will be denied for serious and prolonged constitutional violations. The longer the period of delay, the greater this risk of potential abuse. Ironically, the ripeness doctrine can create a perverse incentive for overzealous governments to create endless procedural hurdles calculated to deny landowners the use or value of their property.

The district court below introduced a whole new set of imponderables into its ripeness calculation. Just how much effort in the private market must people make before they can bring their claims to court? Must advertisements be placed in local newspapers and brokers hired? Does it matter that the landowner must bear these costs if the effort to sell fails? The balance between judicial efficiency and legal protection must at some point shift in favor of opening the courthouse door. That point has been reached, and passed, here. State planning boards must not be allowed to take advantage of *Williamson* to place further roadblocks before the courthouse door. Finality must become a legal reality, not an administrative mirage, manipulated by the very parties that profit by their insulation from judicial review.

TRPA also undermines the decision of this Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which held that temporary takings by regulation should be treated like temporary takings by direct occupation. Of what value is that remedy if a governmental body can string out its deliberations over the fate of a particular landowner during periods of "normal delay" for administrative matters. *See First English*, 482 U.S. at 321. That period of delay should not be lengthened to cover administrative and business matters unrelated to the use of the land at issue.

As a matter of basic due process, all individuals have a right to have their dealings with government agencies subject to timely and effective review in a court. In dealing with this issue, this Court should not forget that administrative agencies do not have internal gyroscopes that automatically insure that their every action serves the public interest. These agencies have institutional incentives and agendas of their own. Planning commissions are not neutral and disinterested arbitrators of disputes. The agencies often are responsible for the



enforcement of the very policies they promulgate. Separation of powers is thus compromised in administrative settings, and some bias in the execution of their mandate is likely to occur given the dual rules that are occupied. Those agencies having a strong interest in the outcome of a dispute have an incentive to adopt measures that will allow them to advance that interest, even by trampling the rights of ordinary individuals in the process.

*Williamson* does not invite this dangerous extension of the ripeness requirement. Under its rule, a claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186. For the purposes of this case, the key words of this holding are "property at issue." The natural meaning of those words is the property subject to the regulation at hand, which in this case is Ms. Suitum's lot for which all permission to build has been denied in perpetuity. Surely, the property at issue cannot be any other piece of land to which the TDRs, if sold, might eventually attach. The TDRs are not a "use" of Ms. Suitum's property, but are, and are understood by everyone, to be offered in compensation for the property that is lost. *See, e.g.*, Note, *The Unconstitutionality of Transferable Development Rights*, 84 Yale L.J. 1101, 1107 (1975) ("once a TDR is found to be a taking, the question then becomes whether the freely transferable development rights awarded to the landmark owner by the city constitute just compensation"). Likewise TDRs were treated as a form of compensation, not a different version of the property itself, in both the majority and dissenting opinions in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 137 (1978) (Brennan, J.); *Id.* at 151 (Rehnquist, J., dissenting).

Any other conclusion would defy common sense. Surely, Ms. Suitum does not receive some use of her land if TRPA gives her an option to buy Kansas real estate,

1000 shares of GM stock, a state lottery ticket, or a free AMTRAK pass. Use of her own land has been permanently taken from her and TDRs are offered in compensation. The land to which those TDRs might pertain has not even been identified, and the sale of the TDRs would hardly give Ms. Suitum any interest in the land to which they are eventually attached. The only land at issue in this case is her plot of land, and there TRPA has issued its final and decisive order: no development, ever.

Moreover, this common-sense interpretation of *Williamson* is borne out by an examination of the fact patterns to which the rule applies. In *Williamson* itself, the original developer, Temple Hills Country Club Estates, did not have a ripe claim because once its proposals were rejected it "did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and the subdivision regulations." *Williamson*, 473 U.S. at 188. Yet an application for a variance relates to the proposed plans for the development of the particular property. Nothing whatsoever in *Williamson* hints that some possible transaction with respect to an unidentified and unrelated parcel of land should delay access to federal court. Nor does *Williamson* suggest that a land owner is under some duty to place land for sale before attacking the system at hand. Only unresolved issues over future use of the discrete parcel prevented the owner's claim from being ripe.

This conclusion is fortified by the line of earlier Supreme Court cases on which *Williamson* relied. In *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 268 (1981), the landowners mounted a facial attack on the constitutionality of the Surface Mining Control and Reclamation Act of 1977, which required that strip-mined land be returned to its original contour once the work was done. That claim was rejected on the ground



that the landowners "have not availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirements of § 515(d) or waiver from the surface mining restrictions in § 522(c)." *Hodel*, 452 U.S. at 297, *quoted* in *Williamson*, 457 U.S. at 187. Once again the required process affected the property at issue; the failure to resell the land had nothing to do with the ripeness issue.

*Williamson* also relied on *Agins v. Tiburon*, 447 U.S. 255 (1980), where the challenge to a zoning ordinance "was not ripe because the property owners had not yet submitted a plan for development of their property." *Williamson*, 475 U.S. at 187. *Williamson* then brought home the essential point by referring to *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978), where the New York City Landmark Preservation Board had already disapproved a proposed 50 story office tower over Penn Station. That appeal was not regarded as ripe because "the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." *Williamson*, 475 U.S. at 187. Even though *Penn Central* involved the use of TDRs, their potential sale and the potential sale of the terminal were not treated as preconditions for access to federal court.

A sensible approach to the ripeness question was taken in *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995). There, the City of Chicago passed an ordinance that restricted the rights of present owners to transfer their existing liquor licenses. An affected liquor store owner brought suit under 42 U.S.C. § 1983, claiming that the ordinance's restrictions on resale contravened both the equal protection and due process clauses. Chicago claimed that the action was not yet ripe because Marusic

had no immediate plans to sell his business. Judge Easterbrook rebuffed that contention under *Williamson*: "A claim is unripe when critical elements are contingent or unknown. When, for example, a property owner alleges that general regulation affects his land in some special way, the claim is not ripe until all efforts to *avoid the restriction or obtain compensation for it are exhausted.*" *Marusic*, 55 F.3d at 260 (emphasis added).

In *Marusic*, 55 F.3d at 261, the plaintiff was allowed to press forward his claim immediately "because the ordinance itself embodied a conclusive decision about transferability." Likewise, in the instant case, TRPA made its conclusive determination about use and has refused to pay full compensation. In *Marusic*, Judge Easterbrook did not require that Marusic seek out potential buyers for the land, or to show exactly how much the value had decreased. The fixed and final position of the City of Chicago was all that it took to make the case ripe. For these purposes, it is immaterial that the Seventh Circuit sustained the ordinance on its merits.

There is no question that if TRPA had baldly prevented any construction on Ms. Suitum's land, it would have been required to compensate her in full and in cash for the use rights that were so lost. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-18 (1992). There is no showing that her proposed use of land amounts to a common law nuisance or to anything close to one. As Lucas' home construction was not a nuisance merely because he owned beachfront property, so too Ms. Suitum's proposed construction of an ordinary home is not a nuisance merely because the land is located in a stream enforcement zone. See *Restatement (Second) of Torts* §§ 826-831, *cited in Lucas*, 505 U.S. at 1030-31. It therefore makes no sense for the District and Circuit Courts to deflect her valid claim for compensation by postponing litigation until she disposes of a complex set of TDRs. The



critical question of the valuation of her property rights taken from her can be litigated today.

## II. MS. SUITUM HAS NOT RECEIVED JUST COMPENSATION FOR THE TOTAL LOSS OF ANY ECONOMICALLY VIABLE USE OF HER PROPERTY.

### A. The Just Compensation Clause Requires Full And Perfect Compensation For The Property Taken.

Once Ms. Suitum's claim is ripe, a court must determine whether or not her property has been taken within the meaning of the Fifth Amendment, and, if so, whether just compensation has been offered in exchange. The first issue is clear from the record, given the total deprivation of any economically viable use of her property. The point of contention is whether she has been justly compensated. The applicable standard for just compensation admits of no doubt:

> The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. . . .

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes – that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326-27 (1893).

**B. The Apparent Willingness Of A Governmental Entity To Purchase Ms. Suitum's Land At Below Market Value Does Not, As A Matter of Law, Provide Just Compensation.**

TRPA's first effort to finesse the just compensation requirement is to point to the possibility that the State of Nevada may give Ms. Suitum a reduced price in cash for her land. But this part payment, even if it is ever realized, will not suffice. It is well recognized that a state cannot downzone property with an eye to its purchase at a reduced price. A court will cut through any apparent police power justification when local governments engage in such nefarious practices. For example, that result was achieved in *Riggs v. Township of Long Beach*, 109 N.J. 601, 538 A.2d 808 (1988). The court struck down an ordinance stating that "the purpose of the zoning amendment was not to fulfill the master plan, but to enable the municipality to pay the property owner less than fair



market value under the preexisting zoning ordinance." *Riggs*, 109 N.J. at 615, 538 A.2d at 815.

That result represents the proper response to the abuse of the police power present in this case. It is quite intolerable that a local government should be able to take land worth $100,000, zone it to a fourth of its original value, and then condemn it for $25,000. The very fact that governmental bodies in this case have allegedly sought to take land from owners for a below market price shows how these possibilities flout the just compensation requirement, not satisfy it. TRPA or some other governmental entity might as well claim it could avoid its duty to compensate for the loss of all economically viable use under *Lucas* by offering to pay $1.00 for the land. In the absence of the planning restrictions, Ms. Suitum surely would reject any such purported offer. The $35,000 figure should not be regarded as evidence that Ms. Suitum's land has residual value. It should be regarded as a telling admission that the government is always willing to condemn land for less than its full value, in violation of its constitutional obligations.

**C. The Right To Sell The Encumbered Land To Neighbors Is Not, As A Matter of Law, Just Compensation For The Property Taken.**

TRPA's next line of defense against paying compensation is that Suitum still has the right to sell the property that she cannot use. This means of compensation is far below the full and perfect compensation required from the government. Any sale requires a buyer. However, the class of potential buyers is limited to the class of adjacent neighbors who might wish to add someone else's plot onto their own. The exact price that would be paid cannot be determined short of actual negotiation, but it can be said with complete confidence that the net return to Ms. Suitum would be far less than the value of her land as a

building plot. The use that the buyer could make of the land is limited, because he could never build on the land either. The gain from the purchase is limited as well. The neighbor has no need to purchase the lot to prevent construction, as that already has been accomplished by regulation. Therefore, the most that can be gained is private access and perhaps some additional measure of privacy. These conditions are so restrictive as to block many sales, and to allow some for small amounts after difficult negotiations. That paltry residue is far below the full and perfect compensation required under the Constitution. Moreover, that possibility exists in *every* case in which the use of land is restricted. Yet it played no role whatsoever in *Lucas*, where the state was required to compensate in full when it denied Lucas his right to build under circumstances indistinguishable from those here.

### D. The Transferable Development Rights Do Not, As A Matter of Law, Constitute Just Compensation For The Development Rights Taken Under TRPA's Comprehensive 1987 Plan.

Properly deployed, TDRs can serve as a useful tool for land use planning. TDRs are proper constitutional devices when the state first condemns *for cash* the development rights from individual landowners. Thereafter it may hold these in reserve or resell them to private owners for use. Because full and just compensation has been paid at the outset, the state has every incentive to make sound decisions on whether to use, resell, or retire the rights. The system of direct condemnation avoids any excessive imposition on individual landowners. The state deployment can then achieve any community objective reached through democratic means. In this case, the



strong preservation of property rights aids the deliberative process by forcing its representatives to consider the *impact* of its planning proposals on all individuals within the community, including those who own property there but who may not be eligible to vote. *See Pennell v. City of San Jose*, 485 U.S. 1, 22 (1985) (Scalia, J., dissenting). This system is easy to administer and was proposed for use in Chicago. John Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574 (1972); John Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75, 86-87 (1973).

However, TDRs become an affront to the constitutional protection of property rights when they are given to individual landowners in part payment for the ordinary development rights of which they have been deprived. Now, instead of introducing transparency in social decision-making, they seek to use "off-budget" devices to force some individuals to bear a disproportionate burden of actions taken in the name of the public good. Let the state pay in money and it is an easy matter to determine whether proper compensation has been paid. Let it pay with TDRs and the state will take refuge in the uncertainties of valuation that it has deliberately injected into the overall situation.

The basic point was made by Justice Breitel in his well-reasoned decision in *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), whose facts bear a close relationship to the instant case. There the plaintiff owned a large mid-Manhattan residential complex that contained two private parks zoned for residential and office development. An amendment to the New York City zoning law reclassified the land as a Special Park District, such that title remained in the private landowners even though the land was held open to the public. Then, New York City stipulated that original development rights for the two parcels were transferable to other locations in mid-Manhattan. The opening of the

lands to unlimited public use was treated as a taking. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Justice Breitel, writing for a unanimous court of appeals, refused to allow the City to credit the TDRs against its compensation obligation:

> [The City's action] thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action.

*Fred F. French*, 39 N.Y.2d at 597-98, 350 N.E.2d at 387-88.

This Court does not have to hold such a negative view on TDRs as to refuse to credit them toward the compensation owing. It is quite sufficient to say that any value that inheres in them is rendered highly uncertain by the nature of the right. New York City was responsible for the creation of that indefiniteness in *Fred F. French*. TRPA is responsible for that indefiniteness here. The party that creates the risk should be required to bear its associated costs. By valuing these rights at zero, the Court sends a clear message to municipalities that TDRs



cannot be used to muddy the waters when a clear function of the courts is to secure full and perfect compensation for the property taken.

Following *Fred F. French* will not unduly limit the ability of local governments to make responsible decisions on land use. In *Fred F. French*, Chief Judge Breitel articulated the position urged here, noting with approval the sensible use of TDRs found in the so-called Chicago plan, which met the conditions of a sound TDR plan set out above because it required local governments to condemn development rights "instantly and in money." *Fred F. French*, 39 N.Y.2d at 598, 350 N.E.2d at 388.

The incentives of the Chicago system are completely different from those under New York City's scheme and TRPA's plan. First, local governments no longer have any incentive to cast the net for these development rights too widely. The cash payments for them must be made out of public budgets so that local officials will now be disciplined in their acquisition plans, just as they are when raw land or completed structures are acquired through standard condemnation practices. Second, local governments have an incentive to repackage these development rights in usable form in order to maximize the amount of cash received from their sale. It is most unlikely that it will break them up into development rights, land coverage rights, and building allocations, as are done under the TRPA plan. Third, the use of this system avoids the massive disparate impact that existed under the schemes in *Fred F. French* and the instant case because no landowner is wiped out by the process. All receive their fair share of benefits and burdens, so as to avoid the disparate impact of regulations that always raises suspicion under the Takings Clause. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the Fifth Amendment guarantee was designed to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole")

To see why the dictates of *Armstrong* are satisfied, assume that 100 lots in the TRPA region are presently undeveloped, and the planning authority is willing to allow only 20 to be developed. Buying and banking development rights allow the state to hold development off the market and to find the highest bidder for the rights that can be immediately utilized. The government that imposes the restriction therefore bears the financial losses from the lots that it chooses to keep out of circulation. But it may correct any mistakes that it makes by auctioning off an additional set of development rights, just the way the FCC can auction off additional portions of the spectrum. *See, generally,* Ronald H. Coase, *The Federal Communications Commission,* 2 J. Law & Econ. 1 (1959).

In contrast, when TDRs are given to individual landowners as ostensible compensation for the property taken, local governments operate under a perverse set of incentives. It is far too easy to create the appearance that something of substance has been given, while fragmenting and conditioning the rights in ways so that their value approaches zero. For example, in *Fred F. French,* New York City's development rights could only be transferred within a certain portion of Manhattan; the receiving lots were "those with a minimum lot size of 30,000 square feet and zoned to permit development at the maximum commercial density." *Fred F. French,* 39 N.Y.2d at 592, 350 N.E.2d at 384. The rights could be transferred to the receiving lot, thereby increasing its maximum floor area up to 10%. Further increase in the receiving lot's floor area, limited to 20% percent of maximum commercial density, was contingent upon a public hearing and approval by the City Planning Commission and the Board of Estimate. Why assume that any market will emerge for these abstract disembodied development rights? And why value them at more than a tiny fraction of the



common law development rights that pre-existed the zoning change of the original private parks? In this case, the TDRs are fragmented into three separate components which, even when reassembled, can only be used subject to planning approval. And if this scheme is approved, there is every reason to suppose that the next generation of TDRs will be more restrictive and less valuable than those that have preceded it.

Should this plan be approved, land use plans that violate *Armstrong*'s warning against disproportionate impacts will be routinely adopted. Before the onset of TRPA's 1987 plan, one could assume (for illustration only since the record gives no precise numbers) that half the lots under TRPA's jurisdiction had single family homes, and the rest had none. The public determination was made to limit construction on the remaining lots for the benefit of all owners. If the Chicago TDR bank proposal had been followed, the burdens of this public scheme would have been borne equally by established and potential homeowners. But once TRPA's elaborate system of TDRs is put into place, the incidence of the public burdens shifts. Existing homeowners bear none of the cost of the plan, and indeed benefit from the increased value of their existing holdings. All owners of undeveloped plots lose, some more than others. The possibility of the resale of the vacant land to neighbors, TRPA, or some other governmental entity, and the possibility of some independent sale of TDRs shift *none* of the burden of the conservation scheme to the established homeowners. It only spreads it around in some uncertain fashion among the owners of undeveloped lots. Before the scheme was imposed, all of these lot owners had development rights. After the scheme was imposed most have neither the development rights nor their cash equivalent. The bottom line is that, over the life of this program, people who started with development rights will be stripped of them without compensation.

Nor is the use of TDRs as valid compensation devices implicitly authorized by *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978). That decision upheld the application without compensation of a landmark designation statute that prevented the construction of a 50 story office tower above Penn Station. In explaining that decision, Justice Brennan had these observations about TDRs:

> Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burden the law has imposed on the appellants, and, for that reason, are to be taken into account in considering the impact of the regulation.

*Penn Central*, 438 U.S. at 137.

This precarious compromise over TDRs does not survive scrutiny. If the TDR only mitigates the loss in question, then it leaves unsatisfied some portion of the underlying constitutional obligation to make full and perfect compensation. Yet there is no reason for TDRs to remain in constitutional limbo. The remainder of Justice Brennan's opinion explains how the landmark preservation statute at issue in *Penn Central* should pass constitutional muster even if no TDRs are provided. In sharp contrast to the situation here

> the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal



> containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

*Penn Central*, 438 U.S. at 136.

Then to drive home the point, the Court emphasized that its holding was "based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion." *Id.* at 136 n.36. These strictures are a far cry from the instant case where the landowner is denied her primary expectation of building on a building lot, and is restricted to the most incidental uses of property – *e.g.*, gardening, picnicking, etc. – that offer no prospect of "a reasonable return" on investment. In *Penn Central*, the TDRs were the icing on the cake that preserved established uses. They did not and could not constitute the just compensation required when all beneficial use of the land was denied. As then-Justice Rehnquist stressed in his *Penn Central* dissent:

> Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." . . . And the determination of whether a "full and perfect equivalent" has been awarded is a "judicial function." The fact that appellees may believe that TDR's [sic] provide full compensation is irrelevant.

*Penn Central*, 438 U.S. at 150-51 (quoting *Monongahela*, 148 U.S. at 326).

Clear limits have to be placed on the use of TDRs as in-kind compensation for regulatory takings. A strong

presumption should be erected against substituting them for cash outside the context of the Chicago plan, given the difficulties of evaluation and finality they pose. In principle, a government may well be prepared to devise a set of TDRs that has a readily realizable and ascertainable market value that makes them close equivalents to cash. If these conditions are satisfied, they could count as just compensation.

Yet we believe that it is unlikely that these conditions will be satisfied. Creating a system of TDRs costs the public money, which makes their use more cumbersome than cash. Why would a state or local government prefer to bear the costs of creating these requirements if they could not thereby find some way to circumvent the strict constitutional standards on compensation? We therefore predict that few if any schemes will be implemented that meet the strict constitutional requirements set out in *Monongahela* and in this brief. For the moment, however, it is not necessary to erect a per se rule on the question. It is sufficient in this case to refuse categorically to credit the TDRs offered by TRPA in lieu of its constitutional obligation to compensate Ms. Suitum.

## III. ALLOWING TDRs TO SUBSTITUTE FOR CASH OPENS THE DOOR TO A HOST OF OTHER POLITICAL ABUSES.

This case has great precedential importance for unless this Court takes a firm stand, state and local governments will inaugurate a whole host of other programs to circumvent their obligation to pay compensation for either physical or regulatory takings. Consider, for example, the question of whether the government may discharge its compensation obligations by substituting financial instruments for cash. No decision of this Court has decisively settled this issue. For a collection of the relevant authorities, *see* Douglas T. Kendall & James



Ryan, *"Paying" For the Change: Using Eminent Domain To Secure Exactions And Sidestep Nollan and Dolan*, 81 Va. L. Rev. 1801, 1837-41 (1995). But the issue does admit of a principled answer once the amount owing from the state has been settled. Money should be the only allowable form of explicit compensation. The state should cure a cash shortage by borrowing in capital markets, not by imposing additional obligations on those people it has already singled out as targets for its coercive action.

To see why, assume that the state owes $100,000 for the outright taking of an ordinary piece of land. No slippage in the discharge of that obligation is possible if the state is forced to make good on that obligation in cash. But let the state pay in kind, and the landowner will receive a note whose face value is $100,000, but whose market value is likely to be far less. (No state would ever voluntarily pay with a note worth more than $100,000.) After all, it is commonplace that the market value of financial instruments, when issued, can diverge dramatically from the face amount of the instruments. The specially-tailored note might carry a below-market rate of interest, be backed by inadequate security, or be hedged in by terms and conditions. The note might be nonassignable by the landowner, who must wait a period of years to receive its cash value; yet, the state could have the option to call the note at any time. Why force a landowner to fight two battles and a trial court to make two separate valuations – one for the land and the other for the note – when the capital markets can better value any note the state might care to issue?

The state's taking power may be essential to overcome the individual power to hold out against needed government projects. But money is fungible, so there is no remotely comparable social objective to allow the state to discharge its compensation obligations with notes of questionable value. No private judgment debtor could freely substitute a personal note for cash. Nor could any

buyer of real estate. Why invite abuse by adopting a different rule for state compensation when neutral parties operating in competitive capital markets can cheaply and reliably evaluate financial instruments? A simple rule of constitutional prudence should dictate that explicit compensation always be paid in money, both for physical occupations and regulatory takings.

The above proposition only applies, it must be stressed, when explicit compensation must be paid. It hardly follows therefore that TDRs should be allowed as compensation just because in-kind compensation is allowed in other cases. By drawing the correct distinctions, this Court can, and should, leave undisturbed the evaluation rules applicable when in-kind compensation for any given property holder is derived from the same government scheme that takes private property. In *Bauman v. Ross*, 167 U.S. 548 (1897), this Court held the state could offset from any compensation owed the benefits that accrue to the landowner as a direct consequence of the project in question. Thus, suppose that a landowner has 100 fungible acres worth $100,000, of which 20 are taken for a highway. The compensation owing is presumptively $20,000. But if the remaining holdings of the landowner increase in value to $85,000 because of superior highway access, the amount of cash compensation owing is only $15,000. This principle is perfectly neutral, for should the severance of part of the land reduce the value of the residue to $75,000, then the compensation owing is increased to $25,000. Both cases respond to the same ideal: the landowner's total wealth position should remain at $100,000 when the transaction runs its course.

Note the difference between these in-kind benefits and TDRs. TDRs are artifacts of some accounting conventions; these offsets by contrast reflect real changes in underlying values of the retained property. The unified parcel had a market value before the taking took place, and the portion retained by the original owner retains



some market value once that taking is completed. Unlike the dangers with financial instruments that do not have fixed value, the variations in value in the land cases can run in either direction depending on the relationship between the portion of the land taken and that retained. Since the valuation can move in both directions, the landowner is no longer exposed to systematic risk that the state will use papers of inflated or uncertain value to escape its financial obligations.

These cases of implicit benefits and burdens help place in context some broad statements that the state need not always provide compensation in cash. *See, e.g., The Regional Railroad Reorganization Cases*, 419 U.S. 102, 150 (1974) ("no decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes"). That general statement works best in the cases just mentioned where material benefits flow directly from the government occupation of land, or, in the present situation, from the use restrictions imposed on land. As applied to this case, Ms. Suitum could not challenge any reduction in dollar compensation if the very development ban she protests increased the value of her land by imposing like-restrictions on the property of her neighbors. In the overall scheme of things, this qualification of the basic rule is no small matter, for the fundamental justification of sound zoning schemes rests on the proposition that the value lost from the restriction on one's own land is offset by the benefits imposed on the land of a neighbor:

> A zoning scheme, after all, is similar in some respects to a contract; each party forgoes rights to use its land as it wishes in return for the assurance that the use of a neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare.

*Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 517, 522 P.2d 12, 19 (1974).

Yet, by the same token, these reciprocal benefits cannot simply be presumed because some general ordinance has been put in place. In the instant case, Ms. Suitum is not allowed to develop her land; and no evidence in the record hints that she owns any nearby parcels of developed land that benefit from the restriction. Any offsets inhere to the neighbors who benefit from the open space and the opportunity to buy that land at a small fraction of its pre-restriction value. The basic incentive structure that influences local deliberation must change before any in-kind offsets come into play in this case. This case is not one in which the challenged ordinance restricts all landowners to one single-family home per standard lot, and allows them freedom as to when it may be built. Rather, it is a textbook example of how the early comers pull up the bridge and deny to other owners (who often are not local voters) the power to do what they have done. Any nuanced interpretation of the takings clause should be alert to these differences.

To see the potential for constitutional evasion, one should consider the proposal defended at enormous length by Kendall and Ryan in *"Paying" for the Change: Using Eminent Domain To Secure Exactions and Sidestep Nollan and Dolan*, 81 Va. L. Rev. 1801 (1995). True to the title of their article, they propose to "sidestep" constitutional obligations by dismantling the constitutional protections against illicit exaction that this Court erected in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Their proposal quite simply is that local governments resort to eminent domain to avoid paying cash for land: "where the value of a development permit exceeds the value of the land exaction sought by the town, the town should



take the land through eminent domain and give the landowner the choice between cash compensation and compensation in the form of a development permit." Kendall & Ryan, 81 Va. L. Rev. at 1803. The individual property owner will of course be better off by accepting the permit, so that the land can in effect be acquired for free, which is why the term "paying" is placed in quotes in the title of their article.

While academic discourse permits such inventive shell games, the Constitution does not. Here, adherence to constitutional requirements will not take place if a government can use the funny money of TDRs or other land use restrictions to discharge its constitutional obligation of just compensation. The entire purpose of both *Nollan* and *Dolan* is to insure that the state does not use its power of regulation to acquire the possession or use of land for free. That can be done only if the state is not allowed to create new rights out of whole cloth for the acquisition of land. Requiring that the compensation for the land taken be provided solely and exclusively in money puts an end to this sham, just as it puts an end to the abuses inherent in using TDRs as direct compensation. Upholding the use of TRPA's TDR scheme invites an unwarranted deterioration of the constitutional safeguards erected in *Nollan* and *Dolan*.

## CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed, and the case should be remanded to the District Court with instructions that TRPA pay full and just compensation for the property taken.

Respectfully submitted,

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(14)

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

BERNADINE SUITUM, PETITIONER

*v.*

TAHOE REGIONAL PLANNING AGENCY, RESPONDENT

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE NEVADA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Amici address the following question:

Whether the first prong of *Williamson County*'s ripeness test, properly interpreted, deprives a landowner of a federal forum for her Fifth Amendment takings claim, where the challenged regulation destroys all normal beneficial uses of her property but grants transferable intangible rights, the value of which may readily be determined.

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## INTERESTS OF THE AMICI*

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization established in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.4 million member families. AFBF has participated as an amicus in this Court in support of property rights in cases such as *Lucas* v. *South Carolina Coastal Council*, *Dolan* v. *City of Tigard*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, and *Bennett* v. *Spear*. Amicus Nevada Farm Bureau Federation is a constituent member of AFBF, representing the interests of farmers and ranchers in the State of Nevada, where the property at issue in this case is located.

The AFBF and Nevada Farm Bureau Federation have a direct stake in the outcome of this case. Their farmer and rancher members own or lease significant amounts of land, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. That land is subject to increasingly onerous regulation by federal, state, and local authorities. Amici are, therefore, vitally interested in the procedural rules governing litigation under the Just Compensation Clause, which requires compensation for takings when such regulation goes "too far."

In particular, amici believe it essential that the complex and difficult-to-understand procedural rules that lower courts have derived from *Williamson County* and its progeny—rules that plant a minefield around the courthouse door for even the best represented landowner—should be simplified and

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* The consents of the parties to the filing of this amicus brief are on file with the Clerk.

made fairer. These rules evidence a ripeness doctrine spun out of control. Before they may bring a claim for compensation in federal court, landowners not permitted to make the most productive use of their land must endure

- applications and multiple reapplications for permission to engage in ever more restricted and less economically viable uses of their private property, in order to obtain a "final" agency decision;
- whole new bureaucratic avenues for "relief," created by regulatory agencies more with a view to avoiding a takings judgment than to permitting reasonable uses of land;
- multiple levels of costly state court litigation to determine if state law provides compensation for the land-use restriction; and
- the esoteric question whether to make an *England* reservation of federal rights in state court proceedings, which—in the unlikely event that res judicata, collateral estoppel, or the sheer expense of a second round of litigation do not prevent it—may conceivably allow the landowner to bring a takings claim in federal court years in the future, after all the steps just listed have been completed.

The Ninth Circuit's unduly rigid application of the "final decision" prong of the ripeness rules and its pinched interpretation of the "futility" exception to ripeness requirements have the practical effect not simply of delaying a landowner's federal takings claim but of barring access to a federal forum altogether. Many farmers, ranchers, and other landowners, even when they are able to untangle the rules to understand exactly what must be done to ripen a Fifth Amendment claim, cannot afford the substantial resources of time and money required to endure the multiple applications to



government agencies (still less the lengthy state judicial proceedings) that are currently the predicate for a federal takings suit.

Amici are particularly concerned that, if this Court endorses the Ninth Circuit's approach to ripeness, the government delaying tactics currently rife in the development field will spread to areas of primary concern to farmers and ranchers. These include decisionmaking on Clean Water Act Section 401 and 404 wetlands permits, grazing permits, and Endangered Species Act incidental take permits.

The severe procedural limitations on landowner suits constructed by the lower courts would be wholly unrecognizable to the Framers of the simple and direct mandate of the Just Compensation Clause. Amici have a strong interest in seeing this Court rein in the excesses of the ripeness doctrine to accord America's farmers and ranchers a fair opportunity to vindicate their federal rights to just compensation in a federal forum.

## ARGUMENT

Amici fully agree with petitioner that, correctly analyzed, this case presents a clear example of a "categorical" taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the Tahoe Regional Planning Agency ("TRPA") has "denie[d] all economically beneficial or productive use of [petitioner's] land." *Lucas* at 1015. TRPA's creation of an abstract and inchoate set of transferable development rights ("TDRs") leaves Mrs. Suitum with no economically meaningful *use* of her land at all. Just as in *Lucas*, she has been told that her parcel must "be left substantially in its natural state"—a restriction that this Court said "typically" leaves an "owner of land without economically beneficial or productive options for its use." 505 U.S. at 1018. *Lucas*'s *per se* rule cannot be evaded by TRPA's invention of rights that, although they conceivably may have

some economic value, in no sense constitute a "use" of the parcel to which they attach. Since petitioner's TDRs have no impact on her ability to make productive use of her land—use of which she has now been entirely deprived—she need not, following *Lucas*, pursue any administrative procedures associated with those TDRs to ripen her claim.

Petitioner's arguments on this score are persuasive; amici will not repeat them here. Rather, amici focus on how the Court should approach this case if it concludes that the takings analysis properly proceeds in terms not of "use" but of "*value*." There are three distinct and independent reasons why, even if Mrs. Suitum's TDRs provided her with some value, and value is the correct locus of takings analysis, the Ninth Circuit erred in refusing to address the merits of her Fifth Amendment claim.

First, the ripeness doctrine established in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), now stands as a substantial obstacle—often the most substantial obstacle—to a landowner's ability to obtain just compensation for Fifth Amendment takings. Amici demonstrate in Part I that lower courts interpret this doctrine in an unreasonably stringent manner. Amici urge this Court to make clear that ripeness rules are to be applied not rigidly but pragmatically and with due regard to all the particular circumstances, including the harm that the plaintiff landowner will suffer if consideration of her takings claim is delayed.

Second, amici show in Part II that, even within the existing *Williamson County* framework, the Ninth Circuit reached the wrong result because it construed the "futility" exception to the final-decision rule far too narrowly.

Finally, in Part III, amici demonstrate that the Ninth Circuit's erroneous refusal to recognize that "partial takings" are compensable led it to a mistaken belief that petitioner's



claim turns on whether her land has *any* remaining value. This caused the court to attach undue importance to the question whether transfer of Mrs. Suitum's TDRs might be permitted, thereby allowing her to recover a small part of her investment. In fact, the transferability of Mrs. Suitum's TDRs impacts, at most, the amount of just compensation she is entitled to and should have no effect on the ripeness of her claims.

The value of Mrs. Suitum's rights in her land is subject to proof in the normal way. Both the minimum and maximum diminutions in value resulting from TRPA's regulation are readily determinable and certainly substantial. Since Mrs. Suitum *already incurred* the *minimum* loss of value that could result from TRPA's regulatory scheme when TRPA determined that she could not make economic use of her land but could only seek to sell her TDRs, and since the amount of *that* loss is ascertainable without reference to any TRPA decision about transfer of TDRs, petitioner should be able to pursue her compensation claim immediately. Moreover, in these circumstances we see no good reason why petitioner should not also be able to obtain a declaratory judgment as to the Fifth Amendment consequences if TRPA should deny her the right to transfer her TDRs in the future.

## I. TOO RIGID APPLICATIONS OF *WILLIAMSON COUNTY*'S RIPENESS REQUIREMENTS UNDERMINE THE GOALS OF THE JUST COMPENSATION CLAUSE

This Court has rejected the notion that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2320 (1994). Yet the imposition of uniquely burdensome ripeness rules on takings claims has precisely that result. As a practical matter, takings

plaintiffs—unlike plaintiffs alleging violations of First or Fourth Amendment rights—simply cannot get into court, even when they clearly have suffered serious harm. If property rights are to be afforded the same degree of protection as other fundamental constitutional rights, the ripeness limitations on takings suits must be applied in a more commonsense and flexible manner. See Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations*, 20 Urb. Law. 675, 687 (1988) ("One need not take sides in the dispute between city hall and over-regulated landowners to recognize that the delay inherent in obtaining review of land-use regulations is as much a part of the costly problem as the substantive issue of liability").

### A. Current Ripeness Rules Unjustifiably Weaken Landowners' Fifth Amendment Rights

Article III requires that a federal court claimant suffer "injury in fact" and present a genuine "case or controversy." Beyond that basic minimum, however, procedural requirements designed to ensure that a case is "ripe" for judicial review are "prudential" in nature. *Lucas*, 505 U.S. at 1012-1013. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967). To that end, this Court has said, outside the takings context, that the ripeness "problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.



*Abbott Laboratories* teaches that the goals of the ripeness inquiry are ill served by using a set of rigid and invariable rules and demand instead that courts take a "flexible view of finality" and other ripeness considerations. 387 U.S. at 150. Whether a dispute is ready for judicial determination often depends on the specific facts and history of the case—on details that cannot adequately be captured in a fixed ripeness rule of general application.

Too often, the lower courts, including the Ninth Circuit in this case, have lost sight of this need for flexibility when applying the *Williamson County* ripeness guidelines for takings cases. The *Williamson County* rule for determining whether a federal takings claim is ripe for federal court adjudication has two prongs. The first prong, on which petitioner became impaled, requires that a would-be takings claimant obtain "a final, definitive [decision from the government agency] regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. The second requires the claimant to exhaust state court possibilities of obtaining just compensation before filing a takings claim in federal court. In applying these guidelines, many lower courts have disregarded the *Abbott Laboratories* admonition that they also take into account "the hardship to the parties" when evaluating ripeness. Moreover, they have failed to pay heed to this Court's caution in *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 350 n.7 (1986), a decision on the ripeness of a takings claim *subsequent* to *Williamson County*, that the ripeness doctrine does not require a property owner to resort to "unfair procedures" in order to bring a takings claim to federal court. As a result, all but a small fraction of federal constitutional land use claims have been found unripe and thus not justiciable in federal court. See Blaesser, *Closing the Federal Courthouse Door on Property Owners*, 2 Hofstra Prop. L.J. 73, 91

(1988) (only 5.6% of land use cases were found to be ripe in the period from 1983 to 1988).

The reasoning behind the "final decision" requirement is that a takings claim depends on showing that a regulation "goes too far," and that "a final and authoritative determination of the type and intensity of development legally permitted" on the property is therefore "essential," because "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348. TRPA's requirement that a property owner like Mrs. Suitum, who has been deprived of all possible use of her property, sell TDRs and seek agency approval of *another* property owner's right to use them does not serve that purpose. A court can determine "how far the regulation goes" without that additional, surplus, and ridiculously burdensome step. The fact is, as the district court found, that Mrs. Suitum "may not develop or build on the parcel of land she owns." Pet. App. D3. That is enough for a court to determine "how far the regulation goes." And even if the locus of the inquiry into whether regulation has gone "too far" is the value of Mrs. Suitum's TDRs, the maximum value of those rights is determinable in the usual way, so that there is no need to delay litigation of Mrs. Suitum's takings claim. See Part III, *infra*.

Ripeness rules that are too rigid invite government agencies to concoct insurmountable and interminable conditions to finality. This Court's Takings Clause decisions repudiate such "gimmickry." *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2317 (1994). TRPA's intricate and unwieldy TDR scheme certainly appears crafted as just such a tactical ploy, and the decision of the court below can only encourage the proliferation of similar devices. Other examples abound. In *Villas of Lake Jackson, Ltd.* v. *Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992), for example, developers expended a great deal of time, money, and resources building infrastructure for a multi-family home project, relying on the county's permission to do so. But when they applied for the permits necessary to complete the project, and despite their having satisfied existing requirements for such permits, the county passed an ordinance changing the requirements. In a Kafkaesque scenario lasting some seventeen years, the developers would meet the new requirements and apply for the necessary permits, only to have the county pass yet more stringent ordinances and deny their applications. Finally, the county abolished the existing multi-family designation, changing it to single-family and leaving the developers high and dry. The court, in a vivid display of inflexible adjudication, denied the developers' takings claim as unripe because they had not "requested approval of single family development." 796 F. Supp. at 1481.



Such game-playing by government agencies, seeking to fend off takings claims, commonly extends the resolution of land use disputes for years or even decades. See, *e.g.*, *Corn* v. *City of Lauderdale Lakes*, 95 F.3d 1066, 1067 (11th Cir. 1996) (addressing "for the fourth time a 20-year-old dispute" over whether denial of zoning approval to build a mini-warehouse constituted a taking). These lengthy delays—just to obtain a "final decision" and thereby open the courthouse door to a claim for just compensation—commonly result in irreparable harm to property owners. After all, most landowners depend on financing arrangements that are highly sensitive to delays in the permitting process. The stretching of the ripeness time-frame, resulting from an unyieldingly rigid ripeness doctrine, effectively creates a means test for entry into federal court: only those with huge financial resources and the stamina to outlast government bureaucracies can hope to satisfy this test of endurance. See Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. Western L. Rev. 1, 11 (1992) ("The time and money required to

comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation [and] make substantive review virtually impossible"). Long delays are now frequently and unthinkingly treated as the norm. *E.g.*, *Landmark Land Co.* v. *Buchanan*, 874 F.2d 717, 721-722 (10th Cir. 1989) (calling eight-month delay by agency "strikingly short").

In sum, the "final decision" requirement, as it was applied to Mrs. Suitum and is being applied to many other property owners like her, is no longer limited to its proper justiciability function; rather, it is being wielded so as to determine *outcomes* of land use disputes, always in favor of the regulators. Many property owners have no choice but to throw in the towel and relinquish rights supposedly guaranteed by the Constitution. See Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small"). That is certainly not what this Court intended when it developed the *Williamson County* ripeness test. Otherwise, Mr. Lucas, who never sought a final agency decision on whether he could build houses on his property, could never have appeared before this Court. And it is certainly not what the Framers intended when they inscribed in the Nation's founding charter an interdiction against the taking of private property without just compensation. Landowners' experiences in the lower courts since this Court decided *Williamson County* demonstrate an urgent need for a more flexible approach to ripeness.

### B. This Court Should Establish More Flexible And Pragmatic Tests For Finality In Takings Cases

This Court should take the opportunity offered here to remind the lower courts that, in takings cases no less than



other suits, finality is to be given a flexible construction so as to facilitate—not preclude—informed federal court review of federal claims. At this point, neither litigants nor government agencies have sufficient guidance as to what constitutes a final decision for ripeness purposes in the land use area. Thus, as one commentator notes, it is not "possible to ascertain in advance exactly when a federal court will find a given case to be ripe." Stein, *supra*, 48 Vand. L. Rev. at 25.[1]

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[1] As further evidence of the mind-numbing complexities of current ripeness doctrine, many very basic questions regarding the meaning of the final decision requirement remain unresolved. For example: From which decisionmaker must one obtain a final decision? See *Unity Ventures* v. *Lake County*, 841 F.2d 770, 775 (7th Cir. 1988) (no final decision where denial of approval to develop property came from state, rather than city, agency). What is a "meaningful" application? Must a landowner seek a variance even if none is available, for example, where a variance is barred by ordinance? See *Shelter Creek Dev. Corp.* v. *City of Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988) (requiring application for an unavailable variance). How many reapplications and attempts to obtain variances are necessary? See *Unity Ventures*, 841 F.2d at 775; *Kinzli* v. *City of Santa Cruz*, 818 F.2d 1449, 1452 (9th Cir. 1987). Does only the application that is denied *last* constitute the final decision? If so, does a property owner waive his or her claim for compensation for what he or she lost due to the earlier denials? How is the final decision requirement distinct from exhaustion of agency remedies? In *Williamson County*, this Court stated that exhaustion, in the form of agency review, is not necessary (473 U.S. at 192), yet lower courts continue to rule takings claims unripe where the claimant did not pursue agency appeals. *E.g.*, *Acierno* v. *Mitchell*, 6 F.3d 970, 976, 977 (3d Cir. 1993). One court went so far as to find no final decision under prong one where the property owner had not sought administrative review by a state *court*. *Herrington* v. *City of Pearl*, 908 F. Supp. 418, 424 (S.D. Miss. 1995). Uncertainty as to such fundamental issues

Under current doctrine, there is inevitably uncertainty about whether there has been "a final decision regarding how [a property owner] will be allowed to develop its property," hence about what value has been taken by regulatory action and what value remains in the property. *Williamson County*, 473 U.S. at 190. *Planning agencies do not advise owners what they can do with their property*, but limit themselves to making decisions on particular applications. When an application for a particular use is denied, the owner is rarely any the wiser about what use *would* be permitted by the agency. The owner is instead required to amend his or her application and try again. A ripeness rule requiring that a final decision be obtained precisely determining how the property may be used is unreasonable, because it forces the owner to reapply to the agency multiple times, each time seeking more restrictive and less economically viable uses. It allows the agency, on the other hand, simply to sit back and withhold any statement of what use it would permit, knowing full well that this will derail any takings inquiry into the loss of value that the landowner has incurred.

We suggest that the Court tailor the final decision requirement to its proper purpose of ensuring that a case is, in a *practical* sense, ready for judicial review. See Roberts, *Ripeness and Forum Selection in Land-Use Litigation*, in *Takings: Land-Development Conditions and Regulatory Takings after* Dolan *and* Lucas 46, 56 (D. Callies ed., 1996) ("the rule ought not force the developer to make repeated, increasingly meager requests to make a claim ripe"). First, a more flexible formulation for what constitutes a final decision should be adopted. The Court's formulation in *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992)—"[t]he core question is whether the agency has completed its

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makes takings litigation a crapshoot, and the sort of gamble that most property owners simply cannot afford.



decisionmaking process, and whether the result of that process is one that will directly affect the parties"—gets to the heart of the matter without imposing the counterproductive rigidity that courts have read into *Williamson County's* statement that there must be a final determination about how the land can be used. There are cases in which an agency's elimination of *some* planned uses may affect the property to such an extent that a taking has occurred, even if some other use might possibly be allowed.

Second, a claim should be deemed ripe upon a showing by the property owner that he or she has sought a final decision with *reasonable diligence*. Depending on all the circumstances, this standard could well be met without an owner having to make all the reapplications necessary to pin the agency down on the issue of precisely how it would allow the property to be used.

As an example of how these standards ought to work, suppose that a municipality hears that a farmer is planning to develop for single-family residential use land that is currently zoned single-family but that has previously been used only for raising crops. The municipality precipitously changes the zoning of that property from single-family to agricultural use or open space. The farmer then applies for and is denied approval of a single-family development. In those circumstances, the farmer's takings claim should be considered ripe: it would be unreasonable to require application for a variance or reapplication for some other use when the actions of the municipality leave its intentions quite clear.

In addition to adopting these more practically-oriented general rules of finality in takings cases, this Court should also recognize equitable exceptions to the final decision requirement. As we discuss in Part II, *infra*, as one aspect of this improvement the futility exception should be fleshed out so that useless applications are no longer required. But this

Court should also adopt two additional equitable exceptions to the usual ripeness requirements.

The first exception, which we believe is required by *Abbott Laboratories*, should be for cases where significant harm to claimants is demonstrated. Under this hardship exception, for example, if a landowner who has taken reasonable steps to obtain a permit can demonstrate that he or she lacks the means to pursue further applications, the last decision by the agency is necessarily a final one and should be subject to constitutional challenge. And even where a landowner has the means to pursue additional applications, at some point courts must recognize that the owner's expenditures already made on planners, architects, soil analysts, engineers, lawyers, and others are enough, and that no more applications will be required.

Particularly relevant in this case, a second equitable exception should be recognized where there is evidence of strategic behavior by regulators. Courts should not accept at face value odd and elaborate schemes like TRPA's program of TDRs, which operate as barriers to a takings suit but serve no further purpose. When a scheme of newly-created rights looks like a strategic way to keep a takings claim unripe rather than a genuine effort to bring relief to landowners, it makes a mockery of the Constitution to require strict compliance with that scheme to ripen a Fifth Amendment claim. Here, the essential oddity and impracticability of the TDR scheme, combined with Mrs. Suitum's expert evidence that no owner had been able to make use of the TDR program, showed that it was merely a ruse and a sham.[2]

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[2] The courts below wrongly held that the affidavit of Mrs. Suitum's expert, Paul Kaleta, should be excluded because he was not a qualified appraiser. Pet. App. A10-A11. This misses the point. As a former TRPA staff member, Mr. Kaleta was well qualified to testify as to whether the TDR program was a sham. He testified that the chance of Mrs. Suitum receiving a building allocation was "minuscule," that each of the six allocations issued in Washoe County in 1993 "were returned back to Washoe County because there was no market for the transferable allocations and they could not be sold," and that "[n]o market exists" for development rights and associated bonus units. Kaleta Aff., ¶¶ 4-6. This evidence was highly relevant to the issues of whether the TDR scheme was a sham and whether an application pursuant to that scheme would have been futile, and it should not have been excluded.



Finally, amici suggest in addition that this Court should make clear that a property owner may seek a federal court declaratory judgment that a regulation or its application constitutes a taking, as opposed to a judgment for compensation, whether or not the claimant has applied for all possible variances and reapplications. See *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 71 n.15 (1978); *New Orleans Public Service, Inc.* v. *New Orleans*, 491 U.S. 350, 372 (1989). As a practical matter, the possibility of an early judicial look at the merits of a takings claim would likely encourage more realistic and open behavior on the part of the land use agency and make delaying tactics less attractive. It should cause agencies to be more forthcoming about what uses they *would* allow on the property, and more helpful to landowners in suggesting ways in which plans could be modified to meet approval.

By such measures, the Court would restore balance to ripeness analysis and thereby head off a deviant doctrine, epitomized by the decision below, "which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope" as to leave property owners "perennially hopeless." Charles Dickens, *Bleak House* 3, 4 (Alfred A. Knopf ed., 1991).

Property rights are too important to "be relegated to the status of a poor relation." *Dolan*, 114 S. Ct. at 2320. There is no valid reason why ripeness requirements should permit the vindication of constitutional property rights only in the most extraordinary circumstances. A right lacking a practical means of vindication is but an empty shell. This Court should ensure that Mrs. Suitum—and all reasonably diligent property owners with a plausible takings claim—are not capriciously barred from federal court.

## II. UNDER A PROPERLY PRAGMATIC APPROACH TO THE FUTILITY DOCTRINE, PETITIONER'S TAKINGS CLAIM IS RIPE

Although this Court has never addressed in any detail the futility exception to *Williamson County*'s finality requirement, there can be little doubt that such an exception exists. Writing for four members of the Court in dissent in *MacDonald*, Justice White stated that while "a landowner must pursue reasonably available avenues that might allow relief, it need not * * * take patently fruitless measures." "Nothing in [this Court's cases]," Justice White observed, "suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position." 477 U.S. at 359. Subsequently, in *Lucas*, a majority held that Mr. Lucas' failure to submit a plan for development was *not* a bar to reaching the merits of his takings claim, because "such a submission would have been pointless." 505 U.S. at 1012 n.3.

The question whether the pursuit of agency approval for a land-use project would be "patently fruitless" because the agency has already indicated its "definitive position" is, we suggest, a factual one, properly dependent on all the circumstances. There is no conceivable warrant for restricting the



breadth of that inquiry through arbitrary formulas about what procedures a landowner must follow before he or she may make a futility argument. Although the lower federal courts have generally acknowledged that there is some sort of futility exception to finality, and have even, on occasion, found pleas to regulators to be futile, *e.g.*, *Eastern Minerals Int'l, Inc.* v. *United States*, 36 Fed. Cl. 541, 547 (1996); *Beure-Co.* v. *United States*, 16 Cl. Ct. 42 (1988), they have limited the scope of the exception for no discernable reason other than to restrict landowners' access to the federal courts. See, *e.g.*, *Traweek* v. *City & County of San Francisco*, 920 F.2d 589, 594 (9th Cir. 1990).

For example, most courts that have addressed the issue have concluded that the futility exception cannot apply until the landowner has made at least one application and that application has been denied. *E.g.*, *Eastern Minerals*, 36 Fed. Cl. at 548 ("Each plaintiff must satisfy the threshold requirement of a single meaningful application to maintain the futility exception"); *Southern Pac. Transp. Co.* v. *City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990) (same); *Unity Ventures* v. *Lake County*, 841 F.2d 770 (7th Cir. 1988) (same). Under this rule, petitioner arguably could not have availed herself of the futility exception, because she had not yet had an application to transfer useable TDRs denied.

This "one unsuccessful application" gloss on the futility rule is insupportable—as is *any* arbitrary rule limiting a court's duty to inquire into all the facts relevant to the question whether the agency has definitively made up its mind. Justice White's observation that "[a] decisionmaker's definitive position may sometimes be determined by factors other than its actual decision on the issue in question" (*MacDonald*, 477 U.S. at 359) is assuredly true, and it cannot be limited to situations where one application (or some other arbitrary number) has been denied.

*Eastern Minerals* provides an example of the capricious results that flow from unduly restricting the futility inquiry. There, the government's statements made clear that *no* application to mine a particular seam of coal would be approved. The Court of Claims held ripe the takings claim of one owner, whose first permit had been denied, because the evidence showed that further applications would likewise be denied. But it held *unripe* the claims of a second owner who declined to make an application because he knew, from the experience of the first owner, that any application he made would be rejected. That ruling, amici submit, was in error. The test for futility should be a purely factual one: do the circumstances show that an application—even a first application—would be futile. The denial of another owner's application for reasons that admit of no exceptions and that apply equally to the plaintiff is enough, amici believe, to establish futility; and there are countless other ways in which futility might be shown in a particular case though no application had yet been denied.

A better, more flexible statement of the futility exception to finality, amici suggest, is that of the First Circuit in *Gilbert* v. *City of Cambridge*, 932 F.2d 51, 61 n.12 (1st Cir. 1991): the exception applies "where the degree of hardship that would be imposed by waiting for the permit process to run its course is so substantial and severe, and the prospects of obtaining the permit so unlikely, that the property may be found to be meaningfully burdened and the controversy concrete enough to warrant immediate judicial intervention." An important "hardship" factor in applying that standard is the plaintiff's current inability to make any use of the land. *Ibid.*

In Mrs. Suitum's case, the excluded evidence of her expert that the TDR scheme was a sham and that no market for TDRs actually existed was certainly relevant to the question of futility. See *supra*, note 2. If that evidence had been accepted—and as a former TRPA official the witness was surely well qualified—the court would have been forced to conclude that any effort by petitioner to sell her TDRs was futile. The futility exception should have applied in this case. More important for the development of the law in this area, this Court should disapprove the baseless constraints that lower courts have imposed on the futility inquiry and make clear that futility is a purely factual issue, subject to proof in innumerable ways and without arbitrary preconditions.



## III. BECAUSE IT IS IMMEDIATELY DETERMINABLE THAT TRPA'S REGULATIONS DEPRIVED PETITIONER'S LAND OF MUCH OF ITS VALUE, HER TAKINGS CLAIM IS RIPE

The Ninth Circuit accepted TRPA's valuation of Mrs. Suitum's TDRs and excluded her expert's evidence that the whole TDR scheme was a sham and the TDRs had no market value. Though amici believe that this was error, even on that basis the court should have recognized that petitioner had a ripe takings claim. TRPA's evidence fixed the maximum value of the TDRs, and, combined with evidence of the value of Mrs. Suitum's lot *with* her right to build a single-family home, allowed calculation of the minimum loss that petitioner suffered as a result of the TDR scheme. The only remaining uncertainty was whether petitioner would in future suffer a *greater* loss if she were denied approval for the transfer of useable TDRs.

In those circumstances, where the minimum loss of value of property is fixed and the only issue is whether a greater loss will be incurred through future regulatory action, amici believe that a claim for a partial taking is ripe. Any other rule would be grossly unfair to landowners: government could prevent a takings claim simply by retaining the power to take *more* of the property in the future!

The Ninth Circuit did not even consider this ripeness question, for it made the fundamental mistake of denying that there is such a thing as a constitutionally cognizable partial taking. It held, inexplicably, that "[t]he imposition of regulatory ordinances that merely diminish the value of property does not constitute a taking." Pet. App. A12. It is important that this Court take the opportunity to correct this misinterpretation of the Fifth Amendment.

In *Lucas*, this Court held that a regulation that deprives the owner of a parcel of "*all* economically beneficial or productive use of [the] land" constitutes a taking and is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." 505 U.S. at 1015 (emphasis added). Contrary to the Ninth Circuit, however, this sort of "categorical" taking is not the sole form of taking governed by the Fifth Amendment. *Lucas*'s categorical rule does not operate to the exclusion of the principle that a substantial diminution in value can also be a compensable partial taking.

In fact, the Court in *Lucas* refuted the dissent's contention that the categorical rule was arbitrary because "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting). The Court observed that "[t]his analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." *Id.* at 1019 n.8. The Court noted that "[s]uch an owner might not be able to claim the benefit of our categorical formulation," but that "'[t]he economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Ibid.*



Although this Court has not yet had occasion to flesh out the partial takings inquiry outlined in *Lucas*, the Federal Circuit has squarely addressed it and has concluded, contrary to the Ninth Circuit, that a substantial diminution in value may amount to a compensable partial taking. See *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994) (finding that a taking may have occurred when the value of land was reduced by approximately sixty percent).[3] The Federal Circuit correctly noted that "[n]othing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." *Id.* at 1568.

The Ninth Circuit's unreasoned rejection of partial takings should not go uncorrected, since it appears to have infected the court's ruling on ripeness. The Ninth Circuit's failure to recognize that partial takings can be compensable led it to conclude that petitioner's takings claim turns on whether her land has some remaining value. Therefore, the court focused on whether petitioner would be permitted to

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[3] Far from being no such thing as a partial taking, there are two different situations in which, the Federal Circuit has recognized, compensation for a partial taking may be constitutionally required. The first is where there has been a substantial diminution in the value of the parcel as a whole, as occurred in this case and in *Florida Rock*. The second is where circumstances suggest that the dimunition-in-value inquiry is properly directed not at the entire parcel but at a discrete sub-unit of the parcel. That issue was addressed by the Federal Circuit in *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994). See, *e.g.*, Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663 (1996); Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994).

transfer useable development rights and whether this transfer would result in a "mere" diminution in the value of petitioner's "bundle of rights" in the parcel, rather than in a compensable "total" taking. But if a less-than-complete diminution in value *can* be a compensable taking, there was no need for petitioner to go through the TDR process before stating a ripe takings claim. The value of Mrs. Suitum's land, both free from and subject to TRPA's regulatory scheme, was readily ascertainable. The *minimum* diminution in value was calculable by taking TRPA's own figures for the value of the TDRs, and the case presented the ripe question whether that diminution was substantial enough to amount to a compensable partial taking.[4]

Moreover, the *maximum* diminution in the value of petitioner's parcel is readily determinable as well, merely by

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[4] Mrs. Suitum and her late husband acquired the parcel at issue in 1972. On three sides of the parcel are lots with residences, and the fourth borders on a paved street. When petitioner submitted to TRPA in 1989 a plan to build a residence on the property, she was told that the parcel was in a Stream Environmental Zone ("SEZ"), and that no new land coverage was permitted there. The idea of an SEZ was created by the 1987 TRPA Plan, which was drafted pursuant to the 1980 Tahoe Regional Planning Compact. Pet. App. A4-A6. Thus, as in *Lucas*, Mrs. Suitum owned the parcel at issue prior to the imposition of the regulatory scheme that required her to leave her land in its natural state. Under the ad hoc test of *Penn Central*, it is important to consider both the "economic impact of the regulation" on petitioner and "the extent to which the regulation has interfered with [her] distinct investment-backed expectations." *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). The economic impact of TRPA's regulatory scheme on petitioner appears to be substantial; and, given her reasonable expectation, at the time of the purchase of the parcel, that she would be able to build a residence, there also has been an interference with her distinct investment-backed expectations.



assuming that TRPA in the future denies approval of the transfer of Mrs. Suitum's TDRs. It would be extremely wasteful of judicial and litigant resources if petitioner were not allowed to proceed with a declaratory judgment action, seeking a declaration that *if* TRPA were to disallow the transfer of useable TDRs, a compensable taking would then have occurred. Since petitioner's minimum and maximum losses are ascertainable now, it makes sense to allow a single action to go forward claiming compensation for a partial taking and a declaration that a complete taking will occur upon denial of the right to transfer petitioner's TDRs. A declaratory judgment will assist TRPA as well as petitioner, by enabling the agency to make a decision on her application to transfer TDRs with full information about the takings consequences of denying her application.

This case perfectly illustrates the incredibly burdensome procedural rules and substantive uncertainties that mar the law of takings, making a day in federal court an unlikely prospect for even the most overregulated landowner. Amici urge this Court to infuse this area with a healthy dose of reality, tying the rules of ripeness to the actual experience of landowners once they enter the regulatory maze. Change is essential to restore the promise of the Fifth Amendment that government may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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**In the**

# Supreme Court of the United States

**October Term, 1996**

BERNADINE SUITUM,
*Petitioner*,

v.

TAHOE REGIONAL PLANNING AGENCY,
*Respondent*.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

## BRIEF OF AMICUS CURIAE, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, IN SUPPORT OF PETITIONER, BERNADINE SUITUM

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## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 37, the Building Industry Association of Washington (BIAW) respectfully submits this amicus curiae brief in support of petitioner, Bernadine Suitum. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

BIAW represents over 6,500 builders and associate members in the residential construction industry in the State of Washington. Its members employ over 100,000 people whose livelihoods depend on the right to own and use land to produce wealth.

The Fifth Amendment to the federal Constitution is a shield against overzealous land use regulation in Washington. Timely access to a judicial forum to challenge confiscatory regulation is of paramount importance to builders. This Court's ripeness doctrine has driven more than one project into bankruptcy.

Using Transferable Development Rights (TDR) as a technique for obtaining public open space at no public expense is a concept that is in its infancy in Washington State, and a topic of much controversy. The State's Growth Management Act, RCW 36.70A.060(4), prohibits designating privately owned urban areas as long term commercial forest or agricultural lands, unless a TDR program is implemented. The members of BIAW are concerned that without guidance of this Court, TDRs may be used to frustrate their rights.

BIAW is interested in the outcome of this case in that it presents the Court with an opportunity to relax the ripeness rules governing access to the courts for aggrieved land owners. BIAW hopes the Court will also reach the question of the

legitimacy of TDRs as a substitute for monetary compensation, and expose their illegitimacy.

## SUMMARY OF ARGUMENT

Property rights stand on equal footing with other constitutional rights. Therefore, plaintiffs asserting taking claims deserve to have their day in court. Despite the constitutionally protected rights at stake, the ripeness doctrine has been misused to close the courthouse door to property owners with taking claims.

This case was dismissed under the "final decision" prong of the ripeness doctrine because the Court of Appeals found that the "transfer of development rights is a 'use' of SEZ [Steam Environment Zone] property." Appendix A at 8, 9. Until Mrs. Suitum attempts to sell development rights, the court ruled, her taking claim is not ripe. This ruling is predicated on an unnatural definition of the word "use." As defined in the dictionary and this Court's precedents, "use" means to put the land itself into service in order to derive enjoyment or income from it. An "economically viable" use provides landowners a "fair return on their investment" (*Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988)) "commensurate with returns on investments in other enterprises having corresp ling risks." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). It is one that is "sufficiently desirable to permit property owners to sell the property to someone for that use." *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984). *No one would pay Mrs. Suitum the going rate for a developable Lake Tahoe lot solely to acquire the ability to sell 183 square feet of lot coverage to someone else.*

Rather than a use, TDRs are better viewed as a gesture of compensation. This Court said as much in *MacDonald,*



*Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986) in referring to the availability of TDRs in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *When the government offers TDRs to an owner whose land has been stripped of all conventional uses, it is a tacit admission that a taking has occurred.*

When properly viewed as an attempt at compensation rather than a use of property, the question becomes, are TDRs a legitimate substitute for the monetary compensation required under the Constitution? The answer is no. This Court decided in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), that the government (not another Tahoe Basin landowner) must pay monetary compensation (not provide some administrative remedy) when it takes private property.

Moreover, since under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the demand for money in exchange for permission to use one's own land would constitute "extortion" (*id.* at 837), the Tahoe Regional Planning Agency cannot require other Tahoe Basin landowners to buy TDRs from people like Mrs. Suitum in exchange for permission to make a use of their land that harms neither public health, safety or welfare nor the environment. "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary ... upon the use of private property." *Washington ex rel Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

*Roberge* and other cases also teach that this TDR scheme violates due process because the constitutionally required remedy is contingent upon the cooperation of third parties whose cooperation cannot be compelled.

## ARGUMENT

## I

## THIS CASE ILLUSTRATES THE NEED FOR RIPENESS REFORM

A taking claim alleges a serious violation of constitutional rights. "[T]he enjoyment of property rights was regarded by the framers ... as an essential pre-condition to the realization of other basic civil rights and liberties." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1971). Federal courts normally pride themselves as the defenders of civil rights and liberties. "The First Congress created federal courts as the chief--though not always the exclusive--tribunals for enforcement of federal rights." *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1962).

Yet, despite the fact that our Constitution protects "[t]he right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel" (*Lynch*, 405 U.S. at 552), federal courts seem to view taking claims as not terribly important and somewhat beneath them. *See* Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Litigating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994).

The explanation for this attitude was given in *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989): "[R]uling case law makes it very difficult to open the federal courthouse door for relief from state and local land-use decisions. The Supreme Court has erected imposing barriers in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) and *Williamson County [Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)]."

One commentator has stated: "Although the Supreme Court's holdings in *Williamson* ... and *MacDonald* ... rested



on procedural grounds, they have inflicted a great deal of damage on private property rights. Indeed, more damage was inflicted than if the Court had simply upheld the constitutionality of the land use regulations." Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992).

Federal courts have used the ripeness doctrine to turn away approximately 95% of the regulatory taking claims filed. *See* Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L. J. 73, 91 (1988).

Although many federal courts believe they are merely diverting these cases to the state courts for decision (*e.g.*, *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214-15 (6th Cir. 1992)), the ironic reality is that the state courts have caught on to the utility of the ripeness doctrine as a means for reducing their dockets, and they too routinely cite *Williamson* and *MacDonald* as grounds for dismissal. *E.g.*, *R/L Assocs. v. Klockars*, 52 Wn. App. 726, 763 P.2d 1244, 1249 (Wash. Ct. App. 1988).

The case at bar is an example of how government attorneys take advantage of the ripeness doctrine to prevent judges and juries from hearing the merits of even those cases where an obvious constitutional violation has occurred.

Mrs. Suitum acquired her lot when construction of a house on the lot was legal and anticipated by its residential zoning. She paid full price for the lot, and subsequently also paid utility and public improvement assessments. The lot is surrounded on three sides by houses, and on the fourth side by a paved street with curbs, gutters, and utility hook-ups for a single family residence. First Amended Complaint at 3:1-8.

As part of its overall efforts to prevent sediment from draining into Lake Tahoe, the Tahoe Regional Planning Agency (TRPA) rezoned Mrs. Suitum's lot to prohibit any land coverage or soil disturbance.

Ordinarily, this would be considered a denial of all economically viable use and would be treated as a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In such a case, the only issue left to be decided is whether the proffered compensation is "just." *MacDonald*, 477 U.S. at 348.

Relevant to that inquiry would be TRPA's Transferable Development Rights (TDR) program. As this Court stated in *MacDonald*:

> [A] Court cannot determine whether a municipality has failed to provide "just compensation" until it knows what, if any, compensation the responsible administrative body intends to provide. ... In Penn Central Transportation Co. v. New York City, for example, we recognized that the Landmarks Preservation Commission ... had authority in appropriate circumstances to ... remit taxes, and *transfer development rights*."

477 U.S. at 350 (emphasis added).

TRPA's regulations permit the owners of SEZ lots to sell their "development rights" (after deducting 99%) if they can find a willing buyer in TRPA's jurisdiction at a location where TRPA will approve an increase in land coverage.

Under *MacDonald*, the availability of this program should be treated as proffered compensation and considered in



determining what amount is yet due from TRPA to Mrs. Suitum as just compensation. *Id.*

However, TRPA seeks to prevent the courts from ever considering whether its TDR scheme fairly compensates property owners for a taking. Therefore, they argue that the courts may not decide whether a taking has occurred or just compensation is due because the case is not ripe.

Citing statements in *Williamson*, *MacDonald*, and *Lucas* that a property owner has a right to make economically beneficial use of his property, TRPA asserts that TDRs are not an attempt to compensate Mrs. Suitum, but are a "use" of her land! Until Mrs. Suitum applies for approval of a TDR transfer, they argue, no one knows exactly what uses will be permitted on her land, and thus her taking claim is not ripe.

The Court of Appeals accepted this argument and thereby shoe-horned this case into the "unripe" category as a quick and easy way to dispose of it.

Property owners and their attorneys should be accorded some leeway to decide whether government interference up to a given point has been sufficient to establish a taking. In Mrs. Suitum's case, for example, the Court of Appeals classified her TDR allocation as a permissible "use." Even if selling a TDR were a "use," she should have been allowed to try her case on the theory that this "use" is not sufficient to avoid a taking. After all, this Court has said repeatedly that whether the government has gone "too far" is an "essentially ad hoc, factual inquir[y]." *E.g.*, *Lucas*, 505 U.S. at 1015, *Penn Central*, 438 U.S. at 124. Property owners should be allowed to make the tactical decision whether they have assembled enough facts to present their case.

Mrs. Suitum might also choose to try her claim on the theory that, whether or not *all* uses have been denied, "the

landowner whose deprivation is one step short of complete is ... entitled to compensation." *Florida Rock Industries, Inc. v. U.S.*, 18 F.3d 1560, 1569 (Fed. Cir. 1994); *Lucas*, 505 U.S. at 1019 n. 8.

Or, Mrs. Suitum might try her claim on the theory that prohibiting all construction on a residential lot "extinguish[es] a fundamental attribute of ownership." *Agins v. City of Tiburon*, 598 P.2d 25 (Cal.Sup.Ct) (1979), *aff'd on other grounds*, 447 U.S. 255, 262 (1980); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 179-80 (1979).

Or, she might try her claim on the theory that, when she and her husband purchased the lot it was advertised and zoned exclusively for residential use, and that being the only purpose for which they bought it, TRPA's action has frustrated her "reasonable investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Because each case is an ad hoc factual inquiry, this Court has recognized a full palette of approaches for finding that government regulation has gone "too far." The ripeness doctrine has been misused to preclude adjudication of Mrs. Suitum's rights, even though she and her attorney believe they can prove a taking on the present record.

Taking claims deserve the same access to judicial review as any other constitutional claim. "[T]he takings clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment; [and] should [not] be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 2320 (1994). This Court should recast the ripeness doctrine so that property owners who wish to try their case on its present facts may do so.



This Court should also reverse the Court of Appeals insofar as it held that TDRs are a potential "use" and that Mrs. Suitum's failure to request approval of a TDR transfer makes her case premature under the finality prong of the ripeness doctrine. Selling TDRs is not a use of property. Moreover, where, as here, the plaintiff is willing to stipulate that the government would approve the transfer, there is no justification for turning the plaintiff away on ripeness grounds.

## II

## ALLOWING THE OWNER TO TRANSFER DEVELOPMENT RIGHTS CANNOT AVOID A TAKING BECAUSE THE SALE OF DEVELOPMENT RIGHTS IS NOT AN ECONOMICALLY VIABLE USE OF LAND

This Court has oft repeated that a regulation which prohibits all economically viable uses of property is a taking. *E.g.*, *Agins*, 447 U.S. at 260; *Lucas*, 505 U.S. at 1016. Declaring a taking claim unripe on finality grounds requires a finding that some economically viable use may yet be allowed on the property that would avert a taking. *MacDonald*, 477 U.S. at 352; *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985).

In this case TRPA contends that forcing Mrs. Suitum to leave her lot undisturbed did not necessarily take her property because an economically viable use may yet remain--namely, the ability to sell 183 square feet of land coverage. Until Mrs. Suitum attempts to make that use of her lot, TRPA argues, her taking claim cannot even be considered.

TRPA's argument is balanced upon an unnatural definition of the word "use." Take away TRPA's definition of "use" and its whole position topples like a house of cards.

Merriam-Webster's Collegiate Dictionary (10th Ed.) defines "use" as meaning "to put into service." It is the utilization of a thing that is available, but idle, in order to derive "benefit or profit" from it.

People buy land because it has the potential to be used, in the normal sense of the word. Most purchasers intend to utilize that potential themselves. However, even those purchases that investors make purely for speculation are based on the land's potential for use by the next buyer. It is the property's potential for use that gives value. That is what makes the property worth buying in the first place. "For what is the land but the profits thereof[?]" *Lucas*, 505 U.S. at 1017 (quoting 1 E Cooke, Institutes, Ch 1, § 1 (1st Am ed 1812)).

Some land is good for farming, other land is good for mining, while other land is good for grazing animals, or cutting timber, or pumping oil, or pumping water, or constructing buildings. But in every case two things are evident: (1) the activity produces a benefit or income, and (2) the activity could not occur on land where all land coverage and soil disturbance was outlawed.

This Court's recognition of an owner's right to a "fair return on their investment" demonstrates that "use" equates with an activity that produces income. *Pennell v. City of San Jose*, 485 U.S. at 13. One who invests in land expects more than an eventual refund of his money. As stated by this Court, "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." *FPC v. Hope Natural Gas Co.*, 320 U.S. at 603.

In the case of land that is developed with a building, construction is not the end. It is the means to an end. Whether the owner intends to live in the building, or rent it,



or operate a business from it, the building is the "principal" from which enjoyment or income will be derived.

The value of Mrs. Suitum's residential lot was its potential to be used for the construction of a custom home. With that potential taken away, and given the lot's size, its location in the middle of a residential subdivision, and the prohibition on any land coverage or soil disturbance, it has lost all ability to be "put into service" for Mrs. Suitum to enjoy or produce an income.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1981), where the taking was in the form of a physical occupation of approximately two square feet of roof space, this Court described the intrusiveness of a physical occupation in terms that could also be used to describe the effect of TRPA's regulation on Mrs. Suitum's lot: "[E]ven though the owner may retain the bare legal right to dispose of the occupied space," he is "unable to make any use of the property." *Id.* at 436.

Would the taking in *Loretto* have been avoided if the State of New York had given Mrs. Loretto a marketable coupon for two square feet of air space? Obviously not. It follows that a TDR coupon cannot restore Mrs. Suitum's otherwise taken use any more than it could have restored Mrs. Loretto's use. At most, the TDR coupon is partial compensation for the rights taken.

In *Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), the Court considered the possibility that in conjunction with a ban on property development, a government agency might implement a "buy-out" program for environmentally sensitive property:

> A government buy-out, of course, would not necessarily shield the government from

> the Takings Clause. Rather, the buy-out would likely implicate the issue of *just compensation*. Thus, a landowner who believed that the government bought out his property at an unfairly low price might choose to bring an action for just compensation. The fact that he already received some money from the government in return for his property does not establish as a matter of law that economically viable *uses* for his property remain.

*Id.* at 1432 (emphasis added).

Thus the *Del Monte* court held, "the mere fact that there is one willing buyer of the subject property ... does not, as a matter of law, defeat a taking claim." *See also Lucas*, 505 U.S. at 1018-20 & n. 8 (rejecting the dissent's view that the fact Lucas could have sold his property indicated no taking occurred).

To determine whether regulation permits economically viable use of property, the Second Circuit looks to "whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone for that use." *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d at 139.

The development rights TRPA says Mrs. Suitum may sell comprise only 1% of her parcel. Hence it is highly unlikely that anyone would pay Mrs. Suitum the going rate for a developable Lake Tahoe lot solely to acquire the ability to sell 183 square feet of lot coverage to someone else.

Where a property owner is forced to perpetually maintain her land "in its natural state" a categorical taking is assumed. *Lucas*, 505 U.S. at 1018. The government's offer



to approve the transfer of TDRs is not an economically viable use which saves the regulation from going too far, it is a gesture of compensation and, as such, is a tacit admission by the government that a taking has occurred.

Even if selling TDRs were considered an economically viable use of property, where, as here, the plaintiff is willing to stipulate that the government would approve the transfer, the court has no need to insist that the transfer be consummated. Just as the Coastal Council in *Lucas* "stipulated below that no building permit would have been issued" (505 U.S. at 1012 n.3), Mrs. Suitum is willing to stipulate that if she could locate a buyer in a proper location for her 183 square feet, TRPA would approve the transfer. Given that stipulation, going through the actual process "would have been pointless," and is therefore unnecessary to satisfy the ripeness doctrine. *Id.* In any event, however, like sale of the property, sale of TDRs is not a use of property. TDRs are also not a valid substitute for compensation.

## III

## ON THE MERITS, TRPA'S TDR ALLOTMENT IS NOT A VALID SUBSTITUTE FOR MONETARY COMPENSATION

When properly viewed as an attempt at compensation, rather than a use of property, the issue becomes whether government can avoid paying money by giving the owner a marketable TDR coupon instead.

For many years some states did not recognize a right to receive monetary compensation as the remedy for a regulatory taking. *See e.g., Agins v. City of Tiburon*, 598 P.2d 25 (Cal.Sup.Ct) (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Where a property owner established that regulation had gone too far, the California courts would issue a writ of

mandate providing an administrative remedy. That changed in 1987 when this Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304.

The California court framed the issue in *First English* as "the question whether a state may constitutionally limit the remedy for a taking to *nonmonetary* relief." *Id.* at 309 (emphasis added). This Court similarly described its task as "the question whether the Just Compensation Clause requires the *government* to *pay* for 'temporary' regulatory takings." *Id.* at 313 (emphasis added).

After reviewing prior cases and "the duty to pay imposed by the Amendment" itself (at 315), this Court held "the Fifth Amendment requires that the *government pay* the landowner for the value of the use of the land [taken]."

As to whether a post-deprivation administrative remedy would suffice, this Court stated:

> [W]here the government's activities have already worked a taking of all use of property, *no subsequent action by the government can relieve it of the duty to provide compensation* for the period during which the taking was effective.

*Id.* at 321 (emphasis added).

Similarly, TRPA's activities have taken all use of Mrs. Suitum's property. The District Court found that the transfer of rights is the only avenue left open to Mrs. Suitum. Appendix D at 3.

TRPA's offer to approve a TDR transfer is a nonmonetary "subsequent action" like the administrative remedy struck



down in *First English*. As such, it does not relieve TRPA of the duty to pay monetary compensation.

TRPA's TDR program is a shell game, easily exposed when one considers whether TRPA could do directly what it now does indirectly. Suppose that, instead of imposing on Mrs. Suitum the responsibility of finding a buyer for her TDRs, TRPA were to pay cash to Mrs. Suitum, then sell the TDRs itself.

Imagine one day a property owner elsewhere in TRPA's jurisdiction approaches TRPA and asks for a permit to build a 2,000 square foot house. He learns that TRPA's regulations allow some land coverage on his parcel, but only enough to build a 1,820 square foot house.

Since his plans are already drawn, and there is adequate land for a 2,000 square foot house, the owner applies for a variance. TRPA finds that the public health, safety, and welfare would not be harmed by a larger house, nor would the environment. TRPA therefore approves the variance, but informs the owner that it will cost him $20,000 to buy the use of the additional square footage of his land.

Under this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825, the demand for money in exchange for permission to use one's own land constitutes "extortion." *Id.* at 837. Applying the *Nollan* analysis, had TRPA simply demanded $20,000 from the man, rather than conditioning his variance upon such a payment, "no doubt there would have been a taking." *Id.* at 831. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (money is property, and is protected by the Takings Clause).

"Given, then, that requiring [the payment] outright would violate the Fourteenth Amendment, the question be-

comes whether requiring it ... as a condition for issuing a land use permit alters the outcome." *Nollan*, 483 U.S. at 834.

"[A] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if refusal to issue the permit would not constitute a taking." *Id.* at 836.

First of all, TRPA's refusal to issue the variance *would* constitute a taking. Land use regulation constitutes a taking whenever it does not "substantially advance legitimate state interests." *Id.* at 834; *Agins, supra*, 447 U.S. at 260. Since increasing the owner's lot coverage will not harm public health, safety, welfare, or the environment, denial of his request to enjoy the use of his own land would be arbitrary.[1]

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

*Nectow v. Cambridge*, 277 U.S. 183, 188 (1927).

"Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary ... upon the use of private property." *Washington ex rel Seattle Trust Co. v. Roberge*, 278 U.S. at 121. For "the right to build on one's

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[1] If it *would* harm the public health, safety or welfare, or the environment, TRPA could not approve the site as a receiving area under its own regulations.



own property ... cannot remotely be described as a 'government benefit.'" *Nollan*, 483 U.S. at 833 n. 2.

Second, even if TRPA could lawfully refuse to issue the permit, the demand for $20,000 would not serve the same purpose as permit denial. Permit denial would limit land coverage on the parcel to 1,820 square feet. The $20,000 will neither limit land coverage on the lot nor mitigate the additional land coverage. Someone might argue that the $20,000 will be used to prevent land coverage on Mrs. Suitum's lot. But that is untrue. TRPA's SEZ regulations *already* prohibit land coverage on Mrs. Suitum's lot, whether this other owner shows up for a variance or not. The $20,000 will merely replenish TRPA's budget.

Since TRPA cannot directly charge permit applicants for increased lot coverage, it should not be allowed to indirectly charge them by artificially lowering their land coverage ratio below what public health, safety, and welfare require, then forcing them to buy back land coverage from people like Mrs. Suitum to whom TRPA owes money.

Finally, TRPA's TDR program is not a legitimate substitute for monetary compensation because it makes the constitutionally required remedy contingent upon Mrs. Suitum obtaining the cooperation of a third party whose cooperation she cannot compel.

To convert her TDR coupon into cash Mrs. Suitum must find (1) a willing third party (2) who owns land under TRPA's jurisdiction, (3) whose land is vacant or not fully utilized, (4) who wants to build or expand, (5) now or in the near future, and (6) whose plans, including expanded land coverage, would be approved by TRPA. Then, *if* the supply and demand conditions of the market are such that TDR coupons sell for the fair market value of the land coverage they represent, Mrs. Suitum will receive the cash value of the use (but not the

ownership) of 183 square feet, less the costs of sale (*e.g.*, advertising and broker's commission). She will *not* be compensated for the other 99% of her property. Any debt service on the property, including the 183 square feet, will still be her responsibility. Any taxes, including for the 183 square feet, will still be her responsibility.

All of the six conditions listed above may or may not exist, and are not within Mrs. Suitum's control.

In *Washington ex rel. Seattle Trust Co. v. Roberge*, *supra*, this Court struck down a Seattle zoning ordinance requiring plaintiffs who sought to rebuild a home for the aged poor to first get the written consent of two-thirds of the property owners within 400 feet of the project. The Court held that it is "repugnant to the due process clause of the Fourteenth Amendment" to empower other property owners with authority to frustrate plaintiff's property rights. *Id.*, 278 U.S. at 144. "They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject [plaintiff] to their will or caprice." *Id.*

A similar holding, although based upon citations to state court precedents, is found in *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir. 1984) where the Court of Appeals held that property rights cannot be constitutionally conditioned upon the property owner securing the "joint action" of third persons whose action cannot be compelled by him. *Id.* at 760-61. *See also Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) ("There is control of the property of plaintiff ... by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power").

In the same way, requiring Mrs. Suitum to secure the cooperation of some unidentified (and perhaps nonexistent) third party before she can receive compensation, when the co-



operation of that third party is not compelled, is a violation of her right to due process.

## CONCLUSION

For the reasons above stated, this Court should reverse the Court of Appeals insofar as it held that a taking of all use of the subject property is not ripe for review until the owner pursues the sale of TDRs, and insofar as it held that TDRs are a potentially viable economic use of property. For guidance on remand, this Court should also consider whether TRPA's TDR scheme acts as a legitimate substitute for monetary compensation, and hold that it does not.

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No. 96-243

In the

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT


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## BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

## INTEREST OF AMICUS CURIAE

The State of New Jersey has successfully implemented a regional land use plan which has long included transfer of development rights ("TDRs") as a critical component. This plan governs development within the New Jersey Pinelands, an area covering one-million acres in southeastern New Jersey (almost a quarter of the State) lying in the heart of the heavily developed Boston-Washington corridor. Through the use of TDRs and other components of the Pinelands plan, New Jersey has been able to manage growth within the Pinelands and thereby preserve the area's unique ecological, historical

and other resources, which include one of the largest pristine aquifers in the world as well as numerous rare plant and animal species.

Petitioner challenges the use of TDRs by the Tahoe Regional Planning Agency ("TRPA"), and claims that because TDRs do not provide a use for her property, TRPA has effected a "taking" of the property under Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992). These contentions are contrary to New Jersey's experience since 1981 in implementing a successful, nationally-recognized, regional TDR program within the Pinelands. That program provides remuneration to property owners whose lands are subject to development restrictions while simultaneously channeling development into appropriate areas.

Acceptance of petitioner's claims of a taking notwithstanding the existence of TDRs could undermine New Jersey's ongoing efforts to control development within the Pinelands in a fair and balanced manner through the use of TDRs and other land use techniques. It also could unnecessarily restrict the future use of TDRs to manage growth effectively in other regional areas.

New Jersey strongly supports TDRs because they can be used to protect natural resources and prevent unnecessary and economically wasteful suburban sprawl in unique environments such as the Pinelands, while also providing relief to property owners. New Jersey therefore urges this Court to confirm that TDRs are a valid land use technique fully consistent with takings jurisprudence.

## SUMMARY OF ARGUMENT

TDRs are a valuable land use device and help offset the economic impacts of newly-enacted development restrictions by ensuring that property where development is limited will retain an economic value. In the New Jersey Pinelands,



TDRs have been successfully used since 1981 as part of a comprehensive land use plan. Since that plan was enacted, growth within the Pinelands has been confined largely to designated growth areas, towns and villages, and has not spread to fragile natural areas or farmlands. As a result, valuable resources within the Pinelands, including a vast reserve of pristine groundwater and numerous rare plant and animal species, have been protected from the impacts of suburban sprawl.

Under the Pinelands TDR system, TDRs are allocated to property owners within the most environmentally sensitive areas and can be sold for use by property owners within designated growth areas who wish to increase the level of permitted development. The TDR allocation system is predictable and a strong TDR market exists. Potential TDR buyers include private parties as well as a State Development Credit Bank and a County Development Credit Bank. As it has become established, the market for TDRs has increased.

Petitioner's takings claim assumes that TDRs do not constitute a property use, and, therefore, that her property has been taken as a result of development restrictions despite the existence of TDRs. However, pursuant to this Court's jurisprudence, a finding of a taking does not depend exclusively on whether development can occur on a property, but on whether as a result of governmental action, property value is substantially eliminated and property is forced to remain economically idle. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1019 (1992). Properties to which TDRs have been allocated do not meet this test, and therefore have not been taken solely because development may not occur on them.

It is well established that States can enact new measures to address newly-recognized problems, even if the new measures reduce the value of property. In addition, this Court has held that property interests entitled to constitutional

protection are created under state law, rather than under the Constitution. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). TDRs are a new property interest created under State law which help reduce the economic impacts of newly-adopted police power measures intended to promote the public health, safety and welfare. As such, they are a valid and important means of providing remuneration to owners of property where development would result in the unacceptable destruction of important resources.

As the experience of the New Jersey Pinelands demonstrates, TDRs can be effectively used both to control growth and provide an economic use of property where development must be restricted. Limiting the use of this device would needlessly restrict ongoing efforts to manage development sensibly and fairly. Therefore, this Court should confirm that TDRs are an appropriate land use device which can provide a beneficial economic use of property.

## ARGUMENT

### I.

### SINCE 1981, TDRS HAVE BEEN SUCCESSFULLY USED TO PROTECT THE NEW JERSEY PINELANDS AND CONTROL DEVELOPMENT IN A FAIR AND BALANCED MANNER.

The New Jersey Pinelands are a unique ecosystem which covers approximately one quarter of the State of New Jersey. The Pinelands provide habitat for more than 90 plant and animal species threatened with extinction in New Jersey, and the area has been designated as an International Biosphere Reserve by the United Nations. The Kirkwood-Cohansey Aquifer, which lies beneath the Pinelands, is one of the world's largest underground water supplies and contains some of the cleanest water in the United States. During the American Revolution, General George Washington's army



used the Pinelands for iron supplies and as a hiding place from the British Army.

In the 1970's, both New Jersey and the United States recognized that unless the Pinelands were protected from the effects of unmanaged growth, their unique natural and historic resources could be lost to the unrelenting development pressure being exerted within New Jersey at the heart of the heavily populated Boston-Washington corridor. Accordingly, in 1978, Congress established the Pinelands National Reserve as the first national reserve, pursuant to the National Parks and Recreation Act of 1978, Pub. Law 95-625. This federal legislation provided funding for the preparation of a comprehensive management plan ("CMP") for the Pinelands. See Gardner v. New Jersey Pinelands Commission, 125 N.J. 193, 198-201, 593 A. 2d 251, 253-55 (1991).

In 1979, New Jersey enacted the Pinelands Protection Act, N.J. Stat. Ann. §§13:18A-1 et seq., and established the Pinelands Commission as the land use planning entity for the Pinelands. N.J. Stat. Ann. §13:18A-4. In 1981, the Commission adopted a CMP which was approved by the United States Secretary of the Interior. See N.J.A.C. §§7:50-1 et seq.; Hovson's v. Secretary of the Interior, 519 F. Supp. 434, 437 (D. N.J. 1981), aff'd 711 F. 2d 1208 (3d Cir. 1983). The goals of the CMP include preservation of the essential character of the pinelands environment, protection of water quality, promotion of agriculture, discouragement of piecemeal development, encouragement of orderly growth within appropriate areas, and preservation of unique and significant Pinelands resources. N.J. Stat. Ann. §13:18A-9.

To facilitate the achievement of these goals, since 1981 the CMP has included a form of TDR known as a Pinelands Development Credit ("PDC"). PDCs are development rights that are allocated to environmentally sensitive sending areas and can be used to increase permitted development within

designated growth or receiving areas. Each transferred PDC transfers the right to build four homes.

The three current Pinelands sending areas represent the most fragile natural areas and the largest farming areas in the Pinelands. Property owners in those areas can sell PDCs if they place a deed restriction on their property ensuring its perpetual use for activities that are compatible with the land's ecology, such as agriculture, lumbering, or recreation. PDCs are valuable to property owners within growth areas as well as to owners of undersized lots on which a municipal zoning variance is required for construction. See Gardner, supra, 125 N.J. at 201-203, 593 A. 2d at 255-56; N.J.A.C. §§7:50-5.41 et seq.

PDCs can be sold to private parties, to the Pinelands Development Credit Bank, a State entity established in 1985,[1] or to a PDC bank established by Burlington County. PDCs also can be used as collateral for loans guaranteed by the State PDC Bank. N.J. Stat. Ann. §13:18A-30; N.J. Stat. Ann. §13:18A-38. In addition, to further facilitate the marketing of PDCs, the State PDC Bank maintains lists of potential PDC sellers and buyers for use by the public. Property owners can obtain a determination of their PDC allocation by submitting a one-page application form to the Pinelands Commission for a letter of interpretation. From 1981 through 1995, 4,232 transferable development rights were formally allocated through this system. See The Pinelands Development Credit Program (1996) at 21; N.J.A.C. §§7:50-4.72 et seq.; Gardner, supra, 125 N.J. at 203, 593 A. 2d at 256.

The Pinelands PDC market is active, and the PDC program has been highly effective in steering development into

[1] The current purchase price for PDCs acquired by the State PDC Bank is $12,600. N.J.A.C. §3:42-5.6. This price was calculated by the PDC Bank to be no more than 80% of the private market value of PDCs. N.J. Stat. Ann. §13:18A-34(g).



growth areas and in preventing development of environmentally sensitive areas. Moreover, activity in the PDC market has increased on a continuing basis as the PDC program has matured. See 28 N.J.R. 5 (1996).

From 1981 through 1995, 12,969 acres within the Pinelands were deed restricted as a result of the PDC program, 1,201 development rights (one development right equals one-quarter PDC) were the subject of initial purchases, and 421 additional development rights were the subject of resales or other secondary transfers. See Pinelands Development Credits Summary Report Through December 31, 1995 (June 1996). In addition, from 1981 to 1995, 86 percent of development within the Pinelands occurred within designated growth areas, and additional development was largely confined to Pinelands towns and villages. See Moore, New Jersey's Special Place: The Pinelands National Reserve, N.J. Lawyer, April 1995.

These results could not have been readily achieved without the TDR program. See Tripp and Dudek, Institutional Guidelines for Designing Successful Transferable Rights Programs, 6 Yale J. on Reg. 369, 378-382 (1989) (describing the success of the Pinelands TDR program and characterizing it as "the most ambitious, innovative, and geographically extensive TDR program in the country"). Thus, in the Pinelands, TDRs are a critical part of the land use process with an established track record and value.

## II.

## RESTRICTING THE USE OF TDRS WOULD UNNECESSARILY UNDERMINE ONGOING AND SUCCESSFUL EFFORTS TO MANAGE GROWTH AND PROTECT NATURAL RESOURCES.

TDRs have been successfully used in areas such as the New Jersey Pinelands to protect environmental and historical

resources, to prevent the loss of farmland to suburban sprawl, and to maintain water quality. TDRs allow those results to be achieved in a fair and balanced fashion by offsetting some of the economic effects that the new protective measures would otherwise have on property owners. See Penn Central Transportation Co v. New York, 438 U.S. 104, 114, 137 (1978); Gardner, supra, 125 N.J. at 213, 593 A. 2d at 261. Without the ability to use TDRs, entities such as the New Jersey Pinelands Commission could be forced to limit the implementation of new regulatory measures needed to address new problems and to promote the public health, safety and welfare.

This Court recognized many years ago that public entities can devise new land use methods to address newly-recognized problems, notwithstanding the fact that those methods may reduce the value of property to a significant degree. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In addition, this Court also has held that property interests entitled to constitutional protection are not created by the Constitution itself, but spring from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Given the states' police power, property owners cannot reasonably expect state law affecting property to remain static. Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1035 (1992)(Kennedy, J, concurring).

In the New Jersey Pinelands and elsewhere, TDRs are a property interest recently created under State law, and address a problem not generally recognized before the 1970's: the potential loss of unique natural or cultural resources to the increasing pressures of suburbanization or other development. Pursuant to this Court's jurisprudence, TDRs are a valid property interest that help adjust the benefits and burdens of recently enacted police power measures. Penn Central, supra, 438 U.S. at 125.



Petitioner claims that a TDR is not a "use" for her property, and that accordingly TRPA's actions have taken the property even though a TDR system exists. However, under this Court's precedents, property is not automatically taken whenever it cannot be developed; it is taken if it is stripped of substantially all economic value and forced to remain economically idle as a result of governmental action. Lucas, supra, 505 U.S. at 1019.

TDRs provide a property where development has been restricted with an important economic use by ensuring that the property will retain a beneficial economic value and that its owner will obtain remuneration. In addition, TDRs do not eliminate or abridge other important property rights, namely the rights of possession and exclusion. Accordingly, a taking cannot be based solely on a development restriction if a TDR system exists and helps to offset the economic impacts of the restriction by providing remuneration to affected property owners.

Restricting the use of TDRs on the basis of takings principles could seriously undermine recent efforts to encourage sensible development and to promote the public health, safety and welfare by preserving important natural and cultural resources. Restrictions on TDRs also could prevent State and local governments from fully exercising an authority that has long been recognized within traditional zoning law: the right to decide what property uses should be allowed in given areas. See Hadacheck v. Sebastian, 239 U.S. 394 (1915). Since the use of TDRs fully comports with takings jurisprudence, can help to achieve important public objectives and can provide a sensible method for remunerating owners of property subject to development restrictions, its use should be upheld by this Court.

## CONCLUSION

For all of the foregoing reasons, the decision of the Ninth Circuit of the Court of Appeals should be affirmed

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SUPREME COURT OF THE UNITED STATES
October Term, 1996

BERNADINE SUITUM,

Petitioner,

- against -

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# BRIEF OF AMICUS CURIAE CITY OF NEW YORK ON BEHALF OF RESPONDENT

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## INTEREST OF AMICUS CURIAE.

The City of New York submits this brief pursuant to Rule 37.5, in support of respondent Tahoe Regional Planning Agency and in favor of affirmance of the decision of the Ninth Circuit Court of Appeals.

Land use regulations, including transferable development rights ("TDRs") are a useful tool of zoning and city planning for the City of New York ("City"). Contrary to the insinuations of petitioner's counsel (Pet. Br. at 32), the use of TDRs by the City of New York in connection with the landmarking of buildings long predates this Court's decision in Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S.Ct. 2886, 2899 (1992), and by no stretch of the imagination can be deemed an attempt to subvert the holding of that 1992 decision.

Every environmental or preservation plan which employs TDRs is unique and must be evaluated on its specific facts. The plan of the respondent Tahoe Regional Planning Agency affects petitioner's unimproved parcel of real property, while the landmark properties of New York City are improved parcels. While thus far few of New York's landmark properties have availed themselves of TDRs because the vast majority do not suffer economic loss, and may even benefit, from their landmark status, TDRs do constitute part of the value of these properties and have permitted development of other parcels beyond that permitted as-of-right.

The outcome of this case is of importance for governmental entities which have used some form of transferable development rights for many years. Petitioner invites this Court to repudiate its previous cases which hold that it is economic value, not sentimental attachment to one particular piece of property, which matters, and to create a

cause of action which is not only brand new but completely outside of the line of this Court's takings cases. Such a holding would inhibit the ability of states and localities to preserve a liveable environment for all their citizens, because it would threaten to make environmental regulation prohibitively expensive. In the case of New York City, whose program is preservationist and relates to improved parcels, such a holding would limit the value of a tool which has proved helpful in assuring the preservation of landmarks.

This Court has never before recognized that a sentimental attachment to one particular piece of land, and only one potential utilization of the property on that physical plot, constitutes a viable takings claim where some economic value still attaches to that plot, and it should decline the invitation to do so here.

Transferable development rights in the City of New York.

**a. Development rights: the background.**

Since the first New York City Zoning Resolution ("ZR") was enacted in 1916, the ZR has limited real property owners' building rights by means of the "zoning envelope", "an imaginary three-dimensional mold representing the maximum bulk to which a building might be developed under the proposed regulations." Richards, Development Rights Transfer in New York City, 82 Yale L. J. 338, 343 (1972). In 1909 this Court had held Boston's height control regulations constitutional in Welch v. Swasey, 214 US 91 (1909).

The Zoning Resolution allocates varying degrees of development rights to all parcels of real property in the City, except for streets and parks. These development rights are stationary and may not be transferred to other parcels of land except as specified in the Zoning Resolution. Controls on



development rights are proportionate to the size of the zoning lot and appropriate to its location, based on such factors as street width, transit access, and neighborhood character. See, Marcus, Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan, 50 Brooklyn L. Rev. 867, 868-69 (1984).

The zoning lot, which is not the same as a tax lot and is defined in ZR § 12-10, is the basic unit for planning control of building height, floor area, residential density, and use. Pursuant to ZR § 12-10, the owners of one or more contiguous tax lots on a single city block may merge their properties for zoning purposes into one zoning lot, provided all lots within the merged lot record the appropriate deed restrictions. Within the merged zoning lot, the owner of one property may apply the unused development rights available to one or more other properties within the lot as-of-right, if in compliance with other provisions of the Zoning Resolution. These "development rights" are typically transferred by private contract when the merger is executed.

In these widely used transactions, which permit a high-rise building to utilize unused or unusable development rights belonging to one or more contiguous low-rise properties on a single block, one tax lot can only transfer its unused development rights[1] to another within its own merged

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[1] The total floor area permitted on a zoning lot is determined by means of the Floor Area Ratio ("FAR"), which expresses the relationship between the amount of useable floor area permitted and the area of the zoning lot on which the building is located. A permitted FAR of 10, for example, allows 50,000 square feet of usable floor area to be constructed on a 5,000 square foot lot (5,000 x 10 FAR). The FAR was devised to prevent a developer from squeezing more stories into the permitted height of the building, and New York City adopted FAR controls in 1961. Development Rights Transfer in New York City, supra, at 346.

(continued...)

zoning lot, but once the new zoning lot is created, the cumulation of development rights is as-of-right. Transferable development rights, in contrast, is a term reserved for the transfer of development rights between zoning lots under conditions specified by statute. See, Marcus, supra, at 870-871.

**b. New York City's Transferable Development Rights.**

Development rights from zoning lots containing buildings designated as New York City landmarks are given special statutory transfer opportunities. Pursuant to specific provisions in the New York City Zoning Resolution ("ZR"), owners of landmark buildings can transfer their unused development rights to a somewhat greater number of locations than would be permissible in a zoning lot merger. ZR §§ 74-71, 74-79.

This Court, in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) ("Penn Central"), upheld the constitutionality of the designation as a landmark of Grand Central Terminal. In that opinion, this Court recognized TDRs as one valuable strand in the "bundle" of rights appertaining to a given property, the value of which should be considered as a beneficial economic use of the property by the court deliberating a takings challenge .

To help "mitigate whatever financial burdens" are imposed on the owner of a landmark building (Penn Central, 438 US at 137), ZR § 74-79 permits the transfer of unused development rights from lots occupied by a landmark to

[1] (...continued)

Unused development rights exist when the bulk of a building or its floor area is less than that permitted as-of-right in the zoning district in which the building is located.



adjacent lots, as that term is defined in the section.[2] The transfer of TDRs from a sending lot to a receiving lot permits the development of the latter lot beyond the limitations otherwise imposed by the Zoning Resolution.

Pursuant to § 74-79, the transfer must be authorized by a special permit granted by the New York City Planning Commission ("CPC"). The CPC must make certain findings specified in ZR § 74-792 "[a]s a condition for permitting such transfer." As in the case before this Court, the Zoning Resolution requires that the applicants for a permit for the transfer of development rights from a lot occupied by a landmark building must include a certified copy of recorded instruments which notify prospective purchasers or mortgagors of the restrictions upon further development of both the sending and the receiving lot. ZR § 74-793.

Special provisions of the Zoning Resolution permit owners of landmark properties in certain special districts to utilize their development rights on nearby parcels. In the Theater Subdistrict of the Special Midtown District, development rights of landmark theaters, including those with landmark interiors, may be transferred as specified in ZR §§ 81-212 and 81-747.

The Special South Street Seaport District, where a TDR "bank" has been established, is an example of the

[2] The Zoning Resolution also permits the transfer of landmark development rights to noncontiguous lots within specific geographic boundaries in two instances. In the Grand Central Subdistrict TDRs from a landmark, including Grand Central Terminal itself, may be transferred within the boundaries of the Subdistrict by City Planning Commission special permit. ZR § 81-63. Similarly, TDRs from the Schermerhorn Row landmark buildings in the Special South Street Seaport District may be transferred to designated receiving lots within the District. ZR § 88-04.

manner in which TDRs not only help preserve landmarks but encourage development of other parcels. A consortium of commercial banks which held mortgages on the old landmark properties released the mortgages and acquired the TDRs, which are "stored" and sold for new development as demand warrants. The TDRs may be transferred from the parcels containing the landmark properties to near-by sites. See, Marcus, supra, at 891 and 899. A 1984 evaluation of New York's TDR program found:

> The Seaport TDR plan has acted as a catalyst for development and as a lifesaver for the threatened landmarks. Freed from their crippling mortgage obligations, the historic South Street Seaport properties have attracted substantial reinvestment financing for extensive rehabilitation. The Seaport has become a major center for tourism.

Marcus, supra, at 892.

**c. The value of TDRs.**

TDRs are both a planning tool which mitigates the economic hardship to individual owners of property subject to regulation and a means to direct desired economic development to nearby but less historically or ecologically sensitive properties. They provide an efficient and workable compromise between the property rights of owners affected by the regulatory scheme and the needs of the community as a whole. Of critical significance, they also help maintain the value of many or all of the properties within the affected areas.

It is settled law in New York State that development rights have value which private parties may and do litigate, Newport Associates, Inc. v. Solow, 30 NY2d 263, 283 NE2d



600, cert. denied, 410 U.S. 931 (1973), and which constitute part of the economic value of parcels whose owner cannot or does not wish to utilize its full allocation of building rights on its own zoning lot.

It is also well settled that TDRs have value which should be considered in a takings challenge. St. Bartholomew's Church v. City of New York, 914 F.2d 348, 357, 359 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) (rejecting appellant's claim that TDRs are worthless); Penn Central Transportation Co. v. City of New York, 42 NY2d 324, 336, 366 NE2d 1271 (1977), aff'd, 438 U.S. 104 (1979) ("These substitute rights are valuable, and provide significant . . . compensation for the loss of rights above the terminal itself"); In re Application of Russo v. Beckelman, 204 AD2d 160, 611 NYS2d 869 (1st Dept. 1994), lv. to appeal denied, 85 NY2d 802, 648 NE2d 792 (1995); Schubert Organization, Inc. v. Landmarks Preservation Commission, 166 AD2d 115, 570 NYS2d 504 (1st Dept.), lv. to appeal denied, 79 NY2d 751, 587 NE2d 289 (1991), cert. denied, 504 U.S. 946 (1992).

The Zoning Resolution provides a series of special provisions which allow owners of designated buildings to transfer their development rights under specified circumstances. In addition to Grand Central, South Street Seaport, and theaters in the theater subdistrict, landmark buildings whose owners have benefitted from the sale of TDRs or similar bulk-shifting provisions include Amster Yard in midtown Manhattan, the Villard Houses on Madison Avenue, the John Street Methodist Church, the India House on Hanover Square, the Old Slip Police Station, 55 Wall Street, City Center Theater, the courthouse of the Appellate Division, First Department, and Saks Fifth Avenue's flagship store. See, ZR §§ 74-711, 74-712; see also, Richards, Downtown Growth Control through Development Rights

Transfers, 21 Real Property Probate and Trust Journal 435, 462-65 (1986).

## ARGUMENT

### I

### THIS COURT SHOULD NOT CREATE A NEW PER SE TAKINGS CAUSE OF ACTION.

This Court, in evaluating the impact of regulatory action on real property rights, has "generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in . . . essentially ad hoc, factual inquiries'". In Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S.Ct. 2886 (1992), it held that "two discrete categories of regulatory action are compensable [as a taking for public use] without case-specific inquiry into the public interest advanced in support of the restraint." Lucas, 505 US at 1015. The first is regulation which requires a property owner to suffer a physical "invasion" of his property, no matter how minute the intrusion or how weighty the public purpose behind it, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419 (1982).

The second category occurs when a state-enacted regulation denies a real property owner "all economically beneficial uses" of his land. 505 US at 1019 (emphasis in original). Before Lucas, this Court had frequently expressed the same concept in similar words. See, United States v. Riverside Bayview Homes, Inc., 474 US 121, 127 (1985) ("economically viable use of . . . land"); accord, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 US 470, 495 (1987); Hodel v. Virginia Surface Mining & Recl., 452 US 264, 295-96 (1981); Agins v. City of Tiburon, 447 US 255, 260 (1960) . The common thread is the emphasis on economic or financial return from the land. "[F]or what is



the land but the profits thereof[?]" 1 E. Coke, Institutes, ch.1, § 1 (1st Am. ed. 1812) (quoted in Lucas, 505 US at 1017).

The petitioner in this case attempts to avoid the "ad hoc factual inquir[y] . . . conducted with respect to specific property and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances" which this Court had long held is required in takings cases. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 US 264, 295 (1980). (She does not contest the legitimate state interest in the protection of Lake Tahoe or dispute that the regulations at issue rationally relate to that interest.) She disingenuously attempts to bring her facts within the recently announced Lucas exception for property which has been deprived by a governmental regulation of all economic value, although she cannot and does not allege that all economic value has been taken from her property.

The petitioner asks this Court to create a third per se takings category, which would require compensation for any regulation which prohibited the use specifically desired by the owner on any particular property. Her counsel argue that because the regulations forbid her to build a residence, which she first proposed to build seventeen years after she acquired the property, there has been a taking.

Petitioner's counsel concedes that transferable development rights allocated or allocable to her property have value (Pet. Br. at 25), although the amount has not yet been determined. The record shows that value will remain to the property even if the development rights are sold. See, Affidavits of Stephen R. Johnson dated December 4, 1993 and March 24, 1994 (pp. 123-32 and 139-43 in the Record on Appeal) in support of Defendant's Motion for Summary Judgment. Therefore, this case cannot be brought under the tent of Lucas, which rested on a state court finding

(questioned by several members of this Court) that Lucas' property had been deprived of all economic value.

Granting petitioner relief at this stage in the proceedings would require the creation of a cause of action never before recognized by this Court as a per se taking. Petitioner's counsel argue that the fact that these TDRs (and the property itself) have value is irrelevant because she cannot use the property for her first-choice use, a retirement homesite.

This Court has never held, even in dicta, that a denial of an owner's first-choice use of her property, without consideration of potential alternative uses, constitutes a taking. See, cases cited in Lucas, 505 US at 1026 n13. This Court's previous holdings on property rights have uniformly emphasized the objective and economic, rather than the subjective and physical, use of property. Implicit in this line of cases is the fact that if the present owner finds that the regulation destroys her particular interest in the property, the property will still, absent extraordinary circumstances, have "market value or resale potential" reflecting uses others may lawfully make of it. Lucas, 505 US at 1033-34 (Kennedy, J., concurring).

More specifically, this Court has never recognized a right to build as a compensable taking where other values, including the right to exclude others and to sell the property, remain to the owner. See, Nollan v. California Coastal Commission 483 US 825, 836 (1987) (the regulatory agency could have forbidden construction of the house altogether, in order to protect the public's view of the beach, without exercising a taking); Dolan v. City of Tigard, 512 US 374, ___, 114 S.Ct. 2309, 2322 (1994) (Stevens, J., dissenting) (city may deny outright building permit for business expansion because of adverse impact on drainage and traffic patterns); Penn Central. The new situation created by the



pressures of development on fragile ecological areas, and the growing understanding that heretofore permissible forms of development have adverse impacts on an entire region, means that the burden placed on state and local governments will be profound if this Court adopts a holding that a prohibition against building, of and by itself, is sufficient to establish a taking.

II

PETITIONER CLAIMS A NOVEL CAUSE OF ACTION NOT PREVIOUSLY RECOGNIZED BY OUR COURTS: THE LOSS OF A RIGHT TO BUILD ON A SPECIFIC PARCEL.

This Court has long recognized that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law". Dolan v. City of Tigard, 512 US 374, ___, 114 S.Ct. at 2316 (1994), quoting Pennsylvania Coal Co. v. Mahon, 260 US 393, 413 (1922). Creating a new per se takings category based on a purported "right to build", regardless of the economic value remaining in the property or the fair compensation proffered for that deprivation, would open the floodgates to demands for compensation for each and every strand in the "bundle" of property rights. No barrier would be left to a situation where every land use regulation would be subject to a takings challenge from every piece of property affected. Where no property owner is required to show that she is economically damaged by the regulation, the potential claims for compensation for a regulatory "taking" are indeed limitless.

As this Court said in repudiating another petitioner's attempt to "shoehorn" its facts into the per se categories announced in Lucas, "To the extent that any portion of property is taken, that portion is always taken in its entirety;

the relevant question, however, is whether the property taken is all, or only a portion, of the parcel in question." Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust, 508 US 602, 644 (1993). Quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 US 470, 497 (1987), this Court said in Concrete Pipe:

> [O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property "whose value is to determine the denominator of the fraction".

508 US at 644. Yet, petitioner Suitum asks this Court to declare that the value that remains in the property (in her case, both the TDRs and the value of the land itself) is irrelevant to a determination that she has suffered a taking.

III

TDRS HELP TO PREVENT A FEW PROPERTY OWNERS FROM BEARING THE ENTIRE BURDEN OF A REGULATORY SCHEME WHICH BENEFITS THE ENTIRE COMMUNITY, AND THIS COURT SHOULD ENCOURAGE THEIR USE.

It is axiomatic that a few individual properties should not be made to bear "public burdens which, in all fairness and justice, should be borne by the public as a whole". Dolan, supra, quoting Armstrong v. United States, 364 US 40, 49 (1960). However, the relief sought by petitioner would so expand the definition of "compensable taking" as to throw the previously settled law, and the many regulatory schemes designed in reliance on that law, particularly those



intended to preserve the natural environment, into uncertainty and encourage endless litigation.

The creation of a new per se takings category would drastically limit any government's ability to preserve or restore environmental values by making the cost of such regulation, in compensation for taking of property, prohibitively expensive, or so uncertain that the regulatory agency dare not act because its potential liability is literally incalculable. Each regulatory takings challenge should be evaluated on its facts, as this Court has previously held; statutory schemes like New York City's landmark program, which not only leave existing property values untouched but give landmark owners valuable additional rights to develop other parcels, should not be subjected to a per se rule which ignores such values and rights.

IV

THIS COURT SHOULD NOT ABANDON ITS PREVIOUS HOLDINGS THAT IT IS THE ECONOMIC VALUE OF THE LAND, NOT A NATURAL RIGHT TO BUILD, WHICH IS THE ESSENCE OF REAL PROPERTY EXPECTATIONS.

Implicit in petitioner's argument is the contention that the property she wishes to build on has a unique, intrinsic value to her for which any economic return is irrelevant. This assertion, however, is completely out of line with this Court's holding on valuation in just compensation cases.

> In view, however, of the liability of all property owners to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for the property or idiosyncratic attachment to it, like loss due to an exercise of

> the police power, is properly treated as part of the burden of common citizenship.

Kimball Laundry Co. v. United States, 338 US 1, 5 (1949), quoted in United States v. 564.54 Acres of Land, 441 US 506, 512 (1979) (emphasis added).

At issue in this case are two incompatible conceptions of real property: is it a physical thing, which is "useless" if an owner's personal expectations are frustrated, or is it the value which may be realized from a number of potential uses? Petitioner would have this Court disregard the value of the TDRs allotted to her land and enshrine a concept of property not heretofore judicially recognized: that any governmental interference with any strand in the "bundle" of legal rights which comprise private property is a compensable taking.

Where, as here, substantial economic value continues to inhere in the property after the challenged regulation has limited its potential use, this Court should not find a compensable taking in the mere denial of a right to build on one specific parcel. The value inhering in the right to build, although nothing can be built on Mrs. Suitum's piece of land, remains to her. She could use the rights herself on another piece of less environmentally sensitive land; she could sell the rights to another; or she could sell the land itself, with or without the TDRs attached. As the Second Circuit Court of Appeals has stated, the key question is whether other persons "might be interested in purchasing all or part of the land" for permitted uses. Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir. 1984), cert. denied sub nom. Eastco v. City of New York, 470 US 1087 (1985); Pompa Constr. Corp. v. Saratoga Springs, 706 F.2d 418, 424 (2d Cir. 1983).



Property is not a thing, but the sum of interests that the law recognizes and protects ("a bundle of rights"). This Court has recognized in the past that "Where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 US 51, 65-66 (1979).

As this Court acknowledged in Lucas, 112 S. Ct. at 2894, it is a "relatively rare situation[] where the government has deprived a landowner of all economically beneficial uses." The same piece of property has a variety of potential uses, and each successive owner may have different reasons for acquiring it. However, if this Court should expand the Lucas rule to cover every parcel upon which the physical erection of a structure may be prohibited, without taking into consideration the value of other rights in the bundle appertaining to a particular property, the situation will not be rare at all,[3] but universal. It will adversely affect all regulatory schemes which rely on TDRs as a means of distributing the benefits and burdens of needed environmental and preservationist restrictions among property owners, and will severely limit the ability of cities and localities to use what has proven to be a useful tool in the City's landmark program.

In conclusion, whether or not the respondent TRPA has gone "too far" in regulating Mrs. Suitum's property is a factual question which cannot be determined without considering the value of her TDRs and the sale value of her

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[3] If the Court intends to unbundle property interests, and look at them individually, it will no longer be so rare or hard to find a taking.

Federman, *Lucas v. South Carolina Coastal Council*: An Antiquated Response to a Modern Problem, 57 Albany L. Rev. 213, 222 (1993).

property to a willing buyer. The creation of a new per se takings category would have a chilling effect on necessary environmental regulation, and should be avoided.

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In The

# Supreme Court of the United States

October Term 1996

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**BERNADINE SUITUM,**

*Petitioner,*

v.

**TAHOE REGIONAL PLANNING AGENCY,**

*Respondent.*

---

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Ninth Circuit**

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## BRIEF FOR AMICUS CURIAE COLUMBIA RIVER GORGE COMMISSION IN SUPPORT OF RESPONDENT

---

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## INTEREST OF THE AMICUS CURIAE

The Columbia River Gorge Commission submits this brief as amicus curiae pursuant to Supreme Court Rule 37. Counsel for the parties have consented to the filing of this brief and copies of their letters of approval are in the possession of the Clerk of the Court.

The interest of the Columbia River Gorge Commission in this case is three-fold. First, the Gorge Commission is a bi-state entity created by federal legislation and an interstate compact[1] between the States of Washington and Oregon to administer the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544. *et seq.* (1986); Or. Rev. Stat. § 196.150 *et seq.* (1995); Wash. Rev. Code § 43.97 *et seq.* (1994) (Columbia River Gorge Compact). The National Scenic Area Act and the Columbia River Gorge Compact provide uniform legal standards and a comprehensive framework for protecting the scenic, cultural, recreational and natural resources, as well as the economy, along both sides of the Columbia River. The

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[1]The Compact Clause of the Constitution provides "No State shall, without the consent of Congress...enter into any Agreement or Compact with any other State..." U.S. Const., art. I, § 10, cl. 3. Congressional consent transforms an interstate compact into a law of the United States. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Unless the law is somehow unconstitutional, a court may not "order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

resulting Columbia River Gorge National Scenic Area thus encompasses portions of both Washington and Oregon but they are administered as one region.

The Columbia River Gorge Commission operates in a manner very similar to the Tahoe Regional Planning Agency (TRPA) and in fact shares many features of TRPA -- including responsibility for implementation of a management plan for a unique area of remarkable splendor, where sensitive resources and development activities co-exist. A decision from this Court relating to the validity of TRPA's authority has a direct bearing on the Columbia River Gorge Commission.

Second, like TRPA, the Columbia River Gorge Commission utilizes a wide range of land use planning and resource management techniques while regulating development. These mechanisms reflect important advances in the field of land use and the extent to which they are available for implementation is a matter of exceptional concern to the Columbia River Gorge Commission. Like TRPA, the Columbia River Gorge Commission is charged with planning and management in an area Congress determined has "national significance." *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992) *cert. denied sub nom, Columbia Gorge United v. Madigan*, 506 U.S. 863 (1992). In such an area, the use of innovative approaches to complex resource issues is essential.[2] Similarly, the presence of large tracts of public land

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[2]As President Reagan stated:

(continued...)



in both the Lake Tahoe region and the Columbia River Gorge reinforces the importance of the national interest at stake.

Third, like TRPA, the Columbia River Gorge Commission and other land use and resource agencies around the nation are required to respond to taking claims from time to time. The question of whether such claims are ripe arises in virtually every case. The need for a final decision with respect to the impact of regulations on a particular parcel of property is crucial. For these reasons, the Columbia River Gorge

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[2](...continued)

> "...I am signing this bill because of the far-reaching support in both states for a solution to the long-standing problems related to management of the Columbia River Gorge."

U.S. Code Congressional and Administrative News, Vol. 6, 99th Cong., 2d Sess. 1986, Legislative History, PL 99-542 - 99-664 (Statement of President Reagan).

As Senator Mark Hatfield stated:

> "The Columbia River Gorge National Scenic Area Act of 1986 is a bold and innovative vehicle which recognizes that a median position between little or no Federal protection for a scenically important area on the one hand, and a wilderness or national park designation on the other, is both prudent and necessary in this age."

132 Cong. Rec. S15,637 (Oct. 8, 1986) (Statement of Sen. Hatfield).

Commission has a well-defined interest in the correct interpretation, implementation and enforcement of interstate standards for enhancing the national interest.

## SUMMARY OF ARGUMENT

The critical focus in a case of this nature is the factual background. A taking claim cannot be determined without it. For this reason, it is essential that one pursuing such a claim utilize the process provided by the agency to clarify the impact of the regulations on the property in question. Through use of the administrative process, agencies like TRPA have the opportunity to provide relief. In most cases, this is the end of the matter. Where it is not, another important objective is served: TRPA is able to make a final decision that provides the benchmarks for determining the value of the property after application of the regulations to the site.

The requirement of a final decision from the agency with respect to a taking claim is fundamental. As this Court held in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the key factors are: (1) the character of the government action; (2) its economic impact on the property owner; and, (3) the extent to which the regulation interferes with distinct investment-backed expectations. This inquiry is, of necessity, ad hoc and fact dependent. *Penn Central*, 438 U.S. at 125.

The decision of the Ninth Circuit Court of Appeals is squarely in accord with these precepts. The Ninth Circuit properly determined the claim in this case is not ripe because a



final decision regarding the value of petitioner's property does not exist. In the alternative, the uncontroverted value established by TRPA through the only expert testimony in the record reveals petitioner's claim of a per se taking does not withstand scrutiny. Moreover, since the property interest in issue is defined by state and federal law in the context of an interstate compact governing a sensitive area in proximity to public lands and resources, with comprehensive planning for an entire region, the Ninth Circuit correctly determined that utilizing TRPA's transfer of development rights program is not futile.

## STATEMENT OF THE CASE

Amicus curiae Columbia River Gorge Commission adopts TRPA's statement of the case.

## ARGUMENT

### I. The Final Decision Requirement Of The Ripeness Doctrine Serves Crucial Purposes

The final decision requirement for a claim like the one in this case results in the evaluation of the impact of the regulations on the property in question. This enables planning agencies like TRPA to apply restrictions to the property while at the same time evaluating the owner's assertion that there is injury arising from the impact of the regulations. The assertion, however, taken by itself, is just that. The facts that shed light on the basis for the assertion are an essential prerequisite to clarity.

*Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) ("This Court consistently has indicated that among the factors of particular significance in the inquiry are the *economic impact* of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a *final, definitive position* regarding how it will *apply* the regulations at issue to the particular land in question." *Id.* at 186. (emphasis supplied)); *Agins v. Tiburon*, 447 U.S. 255 (1980).

The rationale for the final decision requirement of the ripeness doctrine is substantial: "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Moreover, where the final decision requirement is applied, subsequent legal proceedings offer the opportunity for one case to address all the issues raised. *See Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 621 (9th Cir. 1992) *cert. denied*, 114 S. Ct. 60 (1993) (citing with approval *Williamson County*) This ensures the efficient use of resources and furthers the related goals of agency and judicial economy.

Another important consideration in assessing the final decision requirement of the ripeness doctrine is continuity. In order for an agency to effectively and fairly manage the regulatory process, a system that ensures continuity advances important goals including equal protection under the law. The uniformity in this approach is a bulwark against claims of



invidious treatment -- a matter of particular importance in a special area like Lake Tahoe or the Columbia River Gorge where the statutory regime fashioned by Congress and approved by the states is particularly complex and unique. *See Columbia River Gorge United*, 960 F.2d at 110;[3] *see also* Brief of Amicus Curiae League to Save Lake Tahoe.

In addition, the larger question of stability comes into play. The final decision requirement precludes the prospect of

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[3]As the Ninth Circuit determined in upholding the constitutionality of the interstate framework for the Columbia River Gorge:

> "The district court found, and appellant does not dispute, that among Congress' concerns was a desire to preserve the beauty of the area for those who would travel to use the rivers and mountains in it for recreation, thus directly causing interstate travel. Congress also intended to regulate competing economic activities within the scenic area that are activities directly affecting interstate commerce. These activities include logging and fishing. Moreover, and perhaps most important, the area itself is unique in that it consists of portions of two states bisected by a navigable waterway. In such an area, virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications. ...As the district court noted, Congress found this area to be one of critical national significance."

*Columbia River Gorge United*, 960 F.2d at 113.

expensive, premature and piecemeal litigation. *See W. Birkenfeld Trust v. Bailey*, 827 F. Supp. 651 (E.D. Wash. 1993) (citing with approval *Williamson County*). By ensuring a property owner uses the administrative system that brings the facts into clear focus, the agency is not required to defend against claims like the one in this case until basic questions of value are addressed through the decision-making process. Whether the process available at the agency level is the opportunity to transfer development rights or some other means of providing and assessing value, utilizing the administrative framework created by the agency furthers the objective of stability.

Moreover, the final decision requirement enunciated by this Court is followed by state courts in a manner that provides predictability. *Estate of Friedman v. Pierce County*, 112 Wash. 2d 68, 768 P.2d 462 (1989) (citing *Williamson County* -- "Courts cannot address inverse condemnation claims in a vacuum. They must be able to ascertain the remaining *value* of the regulated property. This necessity underlies the requirement of finality of governmental action...it is apparent that this State's exhaustion requirement is entirely consistent with notions of finality and ripeness as those terms are used in federal inverse condemnation analysis." *Id.* at 80) (emphasis supplied); *Fifth Avenue Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978).

Finally, under the separation of powers doctrine, it is especially appropriate to allow the exercise of agency expertise in a case like the one before the Court. After all, Congress, in



concert with California and Nevada, explicitly directed TRPA to exercise broad authority in the development of a comprehensive planning program where innovative approaches are necessary to fulfill the purposes of the law. The factual and regulatory issues that are intertwined here in the context of interstate regulations dealing with a sensitive stream area and water quality, is a matter especially within the province of the agency.[4] In addition, the public trust doctrine requires TRPA to act with special care in protecting the region's resources.

## II. The Challenge To The Final Decision Requirement Of The Ripeness Doctrine In This Case Does Not Withstand Scrutiny

### A. The Petitioner Ignores The Facts

Petitioner's main argument in this Court is that the facts are already clear and there is no need to utilize TRPA's administrative process that enables the parties to evaluate the impact of the regulations on the value of the property.

The record, however, does not actually support this position. It is simply not possible to determine the extent to

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[4]Over twenty-five years ago, before petitioner's purchase of the property in this case, the California Supreme Court found that development interests threatened Lake Tahoe's "fragile ecology" and, that not only the scenic beauty of the region but "the very quality of its natural environment are now at stake." *People ex rel. Younger v. County of El Dorado*, 96 Cal. Rptr. 553, 554-555 (1971).

which petitioner is deprived of the value of her property. First, she failed to submit an application to the agency for approval to transfer the development rights that exist. Until this process is complete, a final decision in regard to the impact of the regulations on the value of the property does not exist. Second, petitioner failed to present even the semblance of a prima facie case for the deprivation of all value in the district court. By neglecting to offer any evidence in accord with the requirements for expert testimony, the taking claim rings especially hollow. A federal court lacks jurisdiction over such an action because there is no case or controversy and the court will not render advisory opinions regarding abstract issues. *Southern Pac. Transp. Co. v. Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1992).

While one use sought by petitioner is precluded in TRPA's regulatory program, the record demonstrates she is not deprived of the value of her property. In pursuing litigation instead of utilizing the agency's administrative process, the property owner is shouting "fire" before the essential elements of combustion exist.

While petitioner is free to engage in this kind of speculation, any efficient use of the legal system must require the party seeking relief to first establish the predicate for jurisdiction in federal court -- a final decision that includes a determination regarding the impact of the regulation on the value of the property.

In this case, the requirements of TRPA's 1987 Regional Plan were in effect prior to petitioner's initial application for



residential development in 1989. The plan and the regulatory program provide opportunities for residential allocation, land coverage and development rights. In failing to pursue them, petitioner does not meet the final decision requirement. Both the regulation's economic impact and the extent to which it interferes with investment-backed expectations remain uncertain. *Penn Central*, 438 U.S. at 124; *Williamson County*, 473 U.S. at 191.

### B. The Petitioner Misapprehends The Law

Petitioner argues that she has a right to develop her property with a specific structure,[5] while steadfastly ignoring the value it retains. But this assertion sidesteps the requirement of the Fifth Amendment which does not prohibit a taking of property but rather, forbids a taking of property without just compensation. *See Broughton Lumber Co.*, 975 F.2d at 621. Since TRPA's regulations include benefits as well as burdens, it is necessary to evaluate the facts before value is fully established. At this point, petitioner has not met this threshold by failing to participate in the regulatory process. The irony is that the only competent evidence in the record regarding the property was presented by TRPA and it establishes petitioner's development rights are valuable. For this reason, her claim on

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[5]Petitioner contends, for the first time on appeal, that denial of construction is a per se taking. *See* Brief In Opposition of Respondent Tahoe Regional Planning Agency To Petition For Writ Of Certiorari, 8.

behalf of the futility exception to the final decision requirement is groundless.

## III. The Use Of Innovative Approaches In Land Use Planning And Natural Resources Management Is An Important Element Of The Law

The use of innovative approaches in land use planning and natural resources management in order to address complex issues is widespread. For example, at the municipal level, the City of New York and the City of Seattle have administered programs for the transfer of development rights for many years. The programs make an enormous contribution to public well-being. Planning, resource and development interests alike are advanced in a manner that has transformed areas and provided significant opportunities for property owners, while at the same time regulating impacts to protect the public interest.[6]

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[6]The City of Seattle uses transfers of development rights to preserve housing and landmark structures. This enables project proponents to purchase development rights from property owners to increase the size and square footage of new building projects. For example, the landmark Eagles Auditorium in the downtown area is under restoration to accommodate a major theater complex and 44 units of affordable housing. By purchasing development rights, the theater complex is allowed to increase the height and square footage of the structure while retaining its historic character. City of Seattle, Department of Construction and Land Use, Rule 20-93; The Center for Community Change (May 1995).



More recently, at the state level, in response to unprecedented growth in the Seattle and Puget Sound area, Washington adopted a system of growth management controls specifically including innovative approaches to land use planning and the transfer of development rights. The state's Growth Management Act provides: "A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights." Wash. Rev. Code § 36.70A.090 (1990). Similarly, in Colorado, the County of Boulder adopted a transfer of development rights program in 1995. The purposes of the ordinance are for preservation of agriculture, open space, natural features and environmental resources. Boulder County Land Use Code, Article 6.

At the regional level, Lake Tahoe, like the Columbia River Gorge, is particularly well-suited to implement innovative approaches to planning and resource protection. The Compact Clause of the Constitution allows governance of both areas by interstate agreements -- "new instruments adapted to new situations" that are available "in the solution of problems presented by...growing interdependence." Frankfurter and Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L.J. 685, 688 (1925); *see also Columbia River Gorge United*, 960 F.2d at 115: "The Columbia

River Gorge Compact is just such an innovative solution to a difficult interstate land preservation problem."[7]

In addition, other regional agencies like TRPA and the Columbia River Gorge Commission have used new approaches to protect sensitive areas of special significance while ensuring citizens are not deprived of the value of their property. In New Jersey, the Pinelands Commission provides for the transfer of development rights while protecting important resources, especially traditional agricultural and forest areas, in a manner that preserves value for owners. *Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 592 A.2d 25 (1991).

All of these programs, administered at the municipal, state and regional level, serve a wide variety of public and private interests that are, contrary to petitioner's exaggerated claim in this Court, far from "trivial." But these approaches to planning are not simply innovative -- more than that, they achieve important community objectives while preserving the "reciprocity of advantage." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). Like TRPA's program, they confer

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[7]Congress demonstrated a special interest in the ecology of the Lake Tahoe area by revising the original 1969 Compact in 1980. Pub. L. 96-551, 94 Stat. 3233 (1980). *See* Brief for Amicus Curiae League to Save Lake Tahoe. As noted, public lands are an important component of the interstate framework which existed before petitioner purchased her property there.



benefits on citizens,[8] in concert with burdens. In addition, like the petitioner here, they are shared by all property owners who have elected to reside within an environmentally sensitive portion of a region like Lake Tahoe, the Columbia River Gorge or the Pinelands that contain unique and valuable resources, along with public lands, where federal and state interests are compelling.

## CONCLUSION

The Columbia River Gorge Commission urges affirmance of the decision of the Ninth Circuit in this case. Petitioner's claims are not ripe and TRPA's regulatory requirements, as one part of a comprehensive framework for management of a unique interstate region, ensure the property in question retains value. The efficacy of the final decision requirement of the ripeness doctrine has stood the test of time and ensured courts are not inundated with speculative

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[8]For example, one recent study has documented that growth management controls in critical area legislation have resulted in an increase in property values in the Chesapeake Bay area, with similar results in Oregon and California. Beaton and Pollock, *Economic Impact of Growth Management Policies Surrounding the Chesapeake Bay Area*, 68 Land Economics 434 (1992). Another study reached a similar conclusion regarding New Jersey's Pinelands area. Beaton, *The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*, 67 Land Economics 172 (1991).

allegations that every government regulatory action eliminates the value of property in violation of constitutional standards.

Moreover, the problem in this case is that petitioner has fashioned a new line of argument on appeal that is not based on the record below. In contending at trial that TRPA's transfer of development rights program did not offer any value, while now claiming a new right to specific development, petitioner has misapprehended the final decision requirement and the crucial focus on value.

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In The

# Supreme Court of the United States

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BERNADINE SUITUM,

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**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF AMICUS CURIAE OF THE LEAGUE TO SAVE LAKE TAHOE IN SUPPORT OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

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## INTEREST OF AMICUS CURIAE

The League to Save Lake Tahoe (the "League") is a nonprofit membership organization dedicated to preserving the environmental balance, scenic beauty, and recreational opportunities of the Lake Tahoe Basin--"an area of unique and unsurpassed beauty situated high in the Sierras along the California-Nevada border." People ex rel. Younger v. County of El Dorado, 487 P.2d 1193, 1194 (Cal. 1971). Formed in 1957 in response to the environmental degradation occurring in the Tahoe Basin, the League comprises a cross section of the Lake Tahoe community: property owners, businesses, environmentalists, and local residents.

The League has long advocated a comprehensive approach to protecting the sensitive resources of the Lake Tahoe Basin. In 1984, the League, along with the State of California, challenged the adoption by the Tahoe Regional Planning Agency ("TRPA") of a new regional plan, on the grounds that the plan failed to achieve the environmental goals of the Congressionally-approved Tahoe Regional Planning Compact ("1980 Compact"). California v. Tahoe Regional Planning Agency; League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 766 F.2d 1308 (9th Cir. 1985) [hereinafter California v. TRPA]. Finding that the regional plan did not meet the requirements of the 1980 Compact, the district court issued a preliminary injunction barring the approval (with certain narrow exceptions) of any development in the Tahoe Basin until TRPA developed a regional plan that would protect the ecology of the Lake. The ninth circuit upheld the district court's ruling and its issuance of a preliminary injunction. Id.

Following issuance of the preliminary injunction, TRPA initiated a broad-based consensus process to develop a regional plan that would comply with the requirements of the 1980 Compact. This process, in which the League was an active participant along with other parties representing the broad range of interests affected by land use decisions in the Lake Tahoe Basin, resulted in TRPA's adoption of the 1987 regional plan. Although the League was concerned that aspects of the 1987

regional plan, such as the transfer of development rights (or "TDR") program at issue here, would increase the overall level of development in the Basin, the League accepted the plan as a compromise that would help to assure necessary environmental protections.

Believing that TRPA has been too willing to permit development at the expense of the environment, the League has often found itself on the opposite side of TRPA during the many battles to protect the Lake Tahoe environment. In addition to its suit over the 1984 regional plan, the League has sued TRPA over the agency's failure to ensure that transportation funds are spent on public transportation, League to Save Lake Tahoe v. Tahoe Regional Planning Agency, No. SLT 10055 (Super. Ct. filed 1990), and more recently, over the approval of the Douglas County Community Plan, League to Save Lake Tahoe v. Tahoe Regional Planning Agency, No. CV S 940069 EJG/JFM (E.D. Cal. filed 1994). These actions were successfully resolved and resulted in improvements in TRPA's regulatory programs.

Over time and with considerable effort from all sides, the conflicts that shaped land use regulatory programs in the Basin have given way to a more consensus-based approach to resolving environmental disputes. The League has been at the forefront of these more cooperative efforts. For example, the League has participated in long-term negotiations over the planned redevelopment of South Lake Tahoe, and is involved (along with business and casino interests) in the Tahoe Transportation Coalition which seeks to improve transportation to and within the Basin. The League is also an active participant in ongoing discussions of the Forest Health Consensus Group, a coalition of governments, private landowners, and other interested parties seeking to develop a management plan for forest lands in the Basin.

The 1987 TRPA regional plan, the product of a lengthy consensus process, represents in the League's view not perfection but an acceptable balance between safeguarding individual property rights and protecting environmental resources. Petitioner's suit threatens this balance.



Written consent to file this brief has been granted by counsel for both respondent and petitioner, and has been lodged with the Clerk of this Court.

## SUMMARY OF ARGUMENT

Because of its spectacular natural beauty, Lake Tahoe, located just a few hours from several major metropolitan areas, has experienced tremendous growth since 1950 and has become the anchor of a regional economy dependent on water recreation, skiing, entertainment, and second homes. People ex rel. Younger, 487 P.2d at 1195 n.3. Development in the Basin, which has been spurred by the quality of the lake environment, is also the primary threat to the attribute that makes Lake Tahoe unique: the quality and clarity of the Lake's water. Described by Mark Twain as "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea . . . [and] the fairest picture the whole earth affords," id. at 1194 (citing 1 Roughing It (Harper & Row) chapter 22, page 15), Lake Tahoe is one of the clearest lakes in the world. People ex rel. Younger, 487 P.2d at 1195 n.5 (citing S.Rep. 91-510, 91st Cong., 1st Sess. (1969)). Sedimentation, erosion, and increased nutrient levels in the Lake, all caused by development in the Basin, however, have diminished the clarity and quality of the Lake's water. Thirty years of water quality monitoring reveals that the famous clarity of Lake Tahoe is rapidly declining. Charles R. Goldman, et al., Decadal, Interannual, and Seasonal Variability in Enrichment Bioassays at Lake Tahoe, California-Nevada, USA, 50 Canadian J. of Fisheries and Aquatic Sci. 1489, 1489 (1993) [hereinafter Goldman].

In 1987, following years of planning, debate, litigation and finally consensus, TRPA enacted a regional plan designed to mitigate the impacts of development, manage the rate and location of future development, improve water quality in the Lake, and protect the interests of property owners consistent with

these environmental goals.[1] TRPA's 1987 regional plan regulates development throughout the Basin and prohibits development on environmentally sensitive lands, including stream environment zones such as the area where petitioner's lot is located. TRPA also adopted a transfer of development rights program which allows property owners to use and receive value for their property by transferring development from environmentally sensitive property to lands more suitable for development.

The 1987 regional plan, which builds on earlier efforts to protect the Basin, is the subject of petitioner's takings challenge. The issue presented for review is whether petitioner was required to participate in the TRPA transfer of development rights program before she could demonstrate that her takings claim is ripe for judicial review. Both courts below held petitioner's takings claim not ripe. This holding is correct, as petitioner has not made a single application to transfer her development rights, and therefore has not received a final determination regarding the use to which her property rights may be put under TRPA's regulatory program.

In an attempt to circumvent the ruling of the Ninth Circuit, petitioner argues that the TDR program does not provide her with "use" of her property, and therefore the ripeness doctrine does not apply. Petitioner's Brief on the Merits at 12-14, 23 [hereinafter Petitioner's Brief]. Petitioner further claims that any application for approval under the TDR program would be futile because the program is nothing more than a "ruse" to circumvent this court's ruling in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Petitioner's Brief, supra, at 23.

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[1] The 1987 regional plan consists of two documents: Tahoe Regional Planning Agency, Regional Plan for the Lake Tahoe Basin, Goals and Policies (adopted Sept. 17, 1986) [hereinafter Goals and Policies]; and Tahoe Regional Planning Agency, Regional Plan for the Lake Tahoe Basin, Code of Ordinance and Rules of Procedure (adopted May 27, 1987) [hereinafter Code of Ordinances].



To the extent the Court entertains petitioner's challenge to the merits of TDR programs, such challenge must fail. As this brief will explain, TRPA's program for transferring development rights between properties located in the Tahoe Basin is part of a carefully constructed regulatory program designed to reduce the documented adverse impacts of development on the water quality of Lake Tahoe, while ensuring significant economic benefits to all property owners in the region (including petitioner). In preventing development on petitioner's property, TRPA has not prohibited all use of her property nor has it deprived petitioner of all economic value in her property. Indeed, the record below is replete with evidence that petitioner's property retains significant economic value. The program as a whole achieves a reciprocity of advantage to all concerned, and, as such, falls comfortably within the limits of constitutionally permissible land use regulation.

## ARGUMENT

### I. THE TRPA PROGRAM REPRESENTS A VALID EXERCISE OF THE GOVERNMENT'S POWER TO REGULATE LAND USE TO PROTECT UNIQUE AND SENSITIVE NATURAL RESOURCES.

The TRPA program protects important government interests, ensures that petitioner's property has substantial value, and provides an effective means for petitioner to realize her reasonable investment backed expectations. Therefore, under established Supreme Court precedent, TRPA's program does not constitute a taking.

#### A. The Lucas "Total Taking" Analysis is Inapplicable Here.

The briefs of petitioner and amici in support of petitioner start from a faulty premise: they posit that the TRPA program is invalid under Lucas because it prohibits development of a single family home on petitioner's property. According to petitioner, the TDR program is merely a ploy to avoid this Court's holding

in Lucas.[2] This is incorrect: in fact Lucas is inapplicable here because TRPA's program neither deprives petitioner of all reasonable uses of her property, nor renders her property valueless.

Petitioner's reliance on the categorical takings analysis of Lucas is based on an overly narrow view of property rights that inappropriately equates the right to "develop" property with the right to "use" property. This Court has always viewed property as a "bundle of rights," which includes among other things, the right to exclude, the right to develop, and the right to sell. Id. at 1027. All of these rights represent "uses" of property; for example, the "right to exclude" has been described by this Court as a "private use" of property. Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987). TDRs also have been described by this Court as a use of property. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978) (the "ability to use [pre-existing] air rights" through a TDR program constitutes a potentially viable use of property.)

The relevant issue for a takings analysis is whether, under the challenged regulation, the property owner's rights may be put to an economically viable use. See, e.g., Lucas, 505 U.S. at 1017 ("[F]or what is the land but the profits thereof?") (citations omitted) and at 1026 (treating the South Carolina coastal law as "a regulation that wholly eliminated the value of the claimant's land."); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) ("What makes the right to mine coal valuable is that it can be exercised with profit.") Often value is associated with the right to develop; however, land that cannot be developed can have significant value for such rights as investment, timber harvesting, farming, or mineral extraction.

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[2] The TDR program was implemented in 1987--well before the Lucas decision was issued. As a simple factual matter, therefore, the program cannot be characterized as an attempt to circumvent this Court's ruling in Lucas.



In the present case, the TRPA program confers on petitioner certain entitlements and rights to use her property in various ways that would not be possible absent the program. Petitioner's ability to transfer specified entitlements represents the development potential of her property under the TRPA program. Petitioner has or can obtain and can transfer three separate development rights: an "allocation" to build a residential unit; up to four residential development rights (which can include three bonus units because her property is located in a stream environment zone); and land coverage rights. Although her use of these rights may be conditioned (they must be transferred to another property); it has not been eliminated. Furthermore, petitioner's rights carry substantial value. See infra Section I.D. Because petitioner possesses property rights with considerable value, this case does not present a categorical taking under Lucas.

### B. After Lucas, A Takings Claim Must Still Consider The Balance Between the Governmental Interest At Stake and the Impact of the Land Use Regulatory Program on the Property Owner.

Petitioner fails to read Lucas in the context of the Supreme Court precedent that predates it. Lucas did not abrogate this Court's historic balancing approach to takings analysis. From Pennsylvania Coal through Lucas, this Court has consistently recognized the necessity of land use regulation to protect a broad range of public interests. Thus, this Court has upheld land use regulations that: order the destruction of diseased cedar trees to prevent infection of nearby orchards, Miller v. Schoene, 276 U.S. 272 (1928); prevent operation of a quarry in a residential area, Goldblatt v. Hempstead, 369 U.S. 590 (1962); preserve historic structures, Penn Central, 438 U.S. 104; protect open space, Agins v. City of Tiburon, 447 U.S. 255 (1980); and regulate coal mining to protect neighboring properties, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987); see also Hadacheck v. Sebastian, 239 U.S. 394 (1915) (barring operation of a brick mill in a residential area).

These decisions all reflect the principle set forth in Penn Central, that when "deciding whether a particular governmental action has effected a taking, this Court focuses [ ] both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ." 438 U.S. at 130-31; see also Keystone Bituminous, 480 U.S. at 490 (reaffirming "the important role that the nature of the state action plays in our takings analysis" and citing Goldblatt, 369 U.S. at 594 and Consolidated Rock Products Co. v. Los Angeles, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962)). Petitioner, however, would do away with any inquiry into the nature of the regulatory program at issue whenever a regulation prohibits physical development of property. Lucas does not support such a position.

In Lucas, this Court determined that government may prohibit all use of property and render the property valueless, without effecting a taking, where such restriction inheres in the "law of property and nuisance." 505 U.S. at 1029. Thus, the balancing test of Penn Central, which evaluates the nature of the public interest at stake and the extent to which the proposed regulation interferes with the property owner's interest in its property, remains critical to the takings analysis. See id. at 1029-31. In Lucas, this Court struck this balance such that regulations rendering property valueless must be based on the background principles of nuisance law. Land use restrictions such as those at issue here that do not result in a "total taking," Lucas, 505 U.S. at 1030, of the value of property must be balanced against the governmental interests that prompted the regulatory scheme. These restrictions do not, however, need to satisfy the strict requirements of the nuisance doctrine.

Indeed, even as to regulations that render property "valueless," members of this Court have criticized the majority's opinion in Lucas as inappropriately limiting the government's regulatory authority: "The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." Lucas, 505 U.S. at 1035 (J., Kennedy concurring). As recognized by Justice Kennedy, the validity of land use regulations must be guided by the reasonable



expectations of the property owner balanced against the need to enact "new regulatory initiatives in response to changing conditions . . . ." Id. Where, as here, the government is faced with "such unique concerns for a fragile land system the State can go further in regulating its development and use than the common law of nuisance might otherwise permit." Id.[3]

Justice Kennedy's concurring opinion in Lucas follows a line of Supreme Court precedent recognizing the need for and constitutionality of strong land use regulations to protect important public interests. The government's authority to regulate land use has never been limited to the ability to abate nuisances. See, e.g., Keystone Bituminous, 480 U.S. at 492 ("[T]he public interest in preventing activities similar to public nuisance is a substantial one, which in many instances has not required compensation.") (emphasis added). Therefore, when addressing a claim for compensation stemming from the destruction of cedar trees in Miller v. Schoene, 276 U.S. 272, this Court found it need not "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." Id. at 280; see also Goldblatt, 396 U.S. at 593 ("Nor is it of controlling significance that the 'use' prohibited here . . . is arguably not a common-law nuisance.") (Citations omitted).

The fragile natural resources at Lake Tahoe and the well-documented threats to these resources posed by development in the Tahoe Basin place TRPA's program well within the limits of regulatory authority established by this Court. As detailed below, the TRPA program grew out of the urgent need to protect the deteriorating quality of the once-pristine waters of Lake Tahoe.

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[3] In any event, water pollution, which has been directly linked to development in the Tahoe Basin, constitutes a nuisance under common law principles. See Carter v. Chotiner, 291 P. 577, 578 (1930); Newhall Land and Farming Co. v. Superior Court, 23 Cal. Rptr. 377, 381 (Ct. App. 1993); see also Goldblatt, 396 U.S. at 596 (upholding restrictions on mining below the water table).

Developed in response to a court order enforcing the mandate of the congressionally-approved Tahoe Regional Compact, the 1987 TRPA regional plan is the result both of documented scientific evidence and of a lengthy consensus process, which included all of the constituencies affected. As such, the TRPA program, which adjusts "'the benefits and burdens of economic life'. . . in a manner that secures an 'average reprocity of advantage' to everyone concerned . . . ." is constitutionally valid. Lucas, 505 U.S. at 1018.

### C. The Tahoe Program Was Developed Over Many Years In Response to Extensive Scientific Evidence Demonstrating That Development in The Lake Tahoe Basin Is A Primary Cause of the Decline of Water Quality in Lake Tahoe.

#### 1. The Water Quality of Lake Tahoe is Threatened by the Impacts of Development.

The Lake Tahoe Basin is an area of undisputed natural beauty. The single attribute that makes Lake Tahoe unique as a national resource is "its remarkable clarity and enormous volume of deep, cobalt-blue waters." Charles R. Goldman and Earl R. Byron, California State Water Resources Control Board, Changing Water Quality At Lake Tahoe: The First Five Years of the Lake Tahoe Interagency Monitoring Program 2 (Tahoe Research Group, Institute of Ecology, University of California Davis, CA) (covering 1979-84) [hereinafter Changing Water Quality]. In 1962, it was possible to see through the waters of the Lake to a depth of 136 feet. People ex rel. Younger, 487 P.2d at 1195 n.5 (citing S.Rep. 91-510 supra). Visibility in the Lake today is only 75-80 feet. Goldman, supra, at 1490. The clarity of the Lake nonetheless remains its outstanding feature.

Lake Tahoe's famous clarity stems from the Lake's very low levels of nutrients such as nitrogen and phosphorus. The natural nutrient level in Lake Tahoe is so low that historically it prevented the growth of algae, which decreases the clarity and



quality of water. Changing Water Quality, supra, at 2, 4-6; see also Goldman at 1489. Over the last three decades, however, levels of these substances in the Lake have increased significantly. Changing Water Quality, supra, at 2, 4-6. These nutrients have stimulated algae growth in the Lake, id., with the result that since 1968, the clarity of Lake Tahoe has decreased by approximately 20%. Richard J. Fink, Public Land Acquisition for Environmental Protection: Structuring a Program for the Lake Tahoe Basin, 18 Ecology L.Q. 485, 504. Algal growth in the Lake has been increasing at a rate of 5.6% a year and the Lake continues to lose its clarity at a rate of .37 meters per year. Goldman, supra, at 1489. Lake Tahoe, "without a drastic reduction in the nutrient loading that supports algal growth, will have lost most of its transparency in only forty more years." Charles R. Goldman, The Eutrophication of Lake Tahoe: A Serious Increase in Algal Growth Accompanied by an Alarming Decline in Transparency 3. (Report to the Senate Select Committee on Tahoe, March 6, 1984).

The primary source of increased nutrients in Lake Tahoe is the increased runoff caused by development in the Tahoe Basin, an area of 501 square miles. Changing Water Quality, supra, at 5, 8; Goals and Policies, supra, at iv. Development disturbs soils, increases impervious surface coverage of natural areas (thereby increasing the rate at which water will flow into streams and ultimately the Lake), causes air pollution and therefore deposition of pollutants to the Lake from the air, and increases the use of fertilizers and other potential sources of nutrient and water pollution, which also drain into the Lake. Changing Water Quality, supra, at 5; John Ayer, Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup, 1 Ecology L.Q. 3, 38 (1971). A 1984 study of the causes of increased nutrients in the Lake found that "the nutrient yield from the various Tahoe watersheds [draining into the Lake] is generally related to the extent of disturbance of soils in those watersheds." Changing Water Quality, supra, at 8.; see also Ayer, supra, at 38 ("human activities that provoke sedimentation are probably the chief threat to the water quality of Lake Tahoe").

Development in stream environment zones is particularly destructive because streams in the Basin drain directly into the Lake; as a result, development on properties immediately adjacent to water courses results in the unimpeded transport of sediment and associated pollutants to the Lake. See Tahoe-Sierra Preservation Council v. State Water Resources Control Board, 259 Cal.Rptr. 132, 136-37 (Ct. App. 1989) (discussing impact of development in stream environment zones on water quality). Petitioner's property is no exception; in early January 1997 the lower one-third of petitioner's property was covered with water as the soil was saturated and Mill Creek overflowed from storms in the Basin. This water flows directly into Lake Tahoe, taking all manner of pollutants with it.

Although petitioner and amici attempt to downplay pollution of the Lake as a trivial aesthetic issue (see, e.g., Brief Amicus Curiae of the Tahoe-Sierra Preservation Council, Inc. in support of petitioner at 7 [hereinafter TSPC Brief]),[4] increased algae production caused by nutrient loading not only clouds the Lake water, it causes eutrophication and has other long-term environmental impacts. Changing Water Quality, supra, at 6. Eutrophication is a serious water pollution problem that decreases available oxygen supply "to the point where aquatic organisms can no longer survive in the deeper waters." Id.[5] In addition,

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[4] Belittling the importance of Lake clarity, an amicus also implies that the TRPA restrictions are designed only to ensure that a "9-inch white disk lowered from a boat near the center of the Lake" can be seen at a certain depth by the human eye. See TSPC Brief, supra, at 7 n.1. Lake clarity is measured by use of a "Secchi disk"--a 9 inch white disk that is lowered into the water until it disappears. Changing Water Quality, supra, at 7. "This transparency measure is traditional in limnology [the study of inland waters] and oceanography and has stood the test of time because of its surprising accuracy." Id.

[5] The Federal Water Pollution Control Act recognizes eutrophication as a source of water pollution through its regulation of pollutants that deplete the amount of oxygen



"[t]he nuisance of algae-enveloped rocks becomes particularly obvious each spring when the dense growth of attached algae [caused by increased nutrient levels] breaks off, floats to the surface, and dies, forming decaying algal mats." Id; see also Ayer, supra, at 9 (siltation from "extensive land disturbance . . . changes the lake's pristine blue to a chocolate brown"). "Three decades of research reveals that Lake Tahoe is undergoing eutrophication at a rate far above that which would occur naturally." Fink, supra, at 503.

Thus, Lake clarity is an important indicator of the water quality and health of the Lake--quality which has been significantly impaired by development in the Basin.

**2. The Land Use Regulatory Program at Tahoe is Carefully Designed to Address the Water Quality Impacts of Development in the Basin.**

**a. Early Attempts by TRPA to Protect the Lake Were Unsuccessful.**

Because of its large size, the 190 square mile Lake was at first able to absorb the considerable impacts of population growth, development, and associated pollution. However, in the 1960s it became clear that the water quality of the Lake was threatened. Ayer, supra, at 28-30. In response to growing evidence that development in the Basin was contributing significantly to water quality degradation, in 1966, the states of California and Nevada imposed a ban on disposal of wastewater within the Tahoe Basin. Fink, supra, at 504. Under this agreement all sewage is transported out of the Tahoe Basin. Id. Then, in 1969, through ratification of the Tahoe Regional Compact (the "1969 Compact"), Congress approved establishment of TRPA--the first regional entity authorized to regulate the

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available to animal life in a water body. 33 U.S.C. § 1314(a)(4).

impacts of development on Lake Tahoe. Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969).

TRPA, pursuant to the 1969 Compact, undertook its first regulatory efforts with the adoption of a regional land use plan in 1971 and a land use development ordinance in 1972. Tahoe Regional Planning Agency, Land Use Ordinance (adopted Feb. 10, 1972) [hereinafter 1972 Ordinance]; Fink, supra, at 505. The land use plan, which formed the basis of the 1972 Ordinance, was developed with the assistance of the United States Forest Service and incorporated what is now referred to as the Bailey system--a land capability rating system designed to restrict development of environmentally sensitive lands while allowing development of appropriate areas. Fink, supra, at 505. The Bailey system categorized land in the Basin according to its suitability for development based on the land's sensitivity to soil erosion, its degree of slope, and the proximity to streams or high water tables. Id. Based on these factors, lands were ranked on a scale of 1 to 7 and were assigned a limit on impervious surface coverage such as buildings or pavement. Robert G. Bailey, U.S. Forest Service, Land Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning 18-22 (1974). Under the Bailey system, 76% of the land in the Basin was eligible for only 1% coverage. Fink, supra, at 505. Of particular importance to the present case, land within what is now referred to as a stream environment zone was eligible for only 1% coverage under Bailey. Bailey, supra, at 19, 22; 1972 Ordinance § 6.2.0.[6]

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[6] Petitioner asserts, without record support, that her land capability classification under the Bailey system was level 6. Petitioner's Brief, supra, at 2 n.1. However, as discussed below, the Bailey system did not classify individual parcels, but identified large geographic areas that fell into different land classifications based on soil type, erosion hazard, and proximity to streams and wetlands. Bailey, supra, at 5; Resources, Community, and Economic Development Division, U.S. General Accounting Office, GAO/RCED-95-22, Forest Service Land Acquisitions Within the Lake Tahoe Basin 5 (Oct. 1994); see also



Although the land use ratings under the Bailey system would have severely restricted development, under the 1969 Compact, TRPA was not effective in regulating development--no matter what its environmental impacts.[7] In 1980, in response to increasing conflict over development and its adverse consequences, Nevada and California agreed to amend the Regional Compact. Fink, supra, at 506. Congress ratified the 1980 Compact. Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233 (1980). Under the 1980 Compact, TRPA was required to establish "environmental threshold carrying capacities" for the resources in the Basin and was prohibited from approving development that would prevent the achievement of these thresholds. Id. at 507;[8] California v. TRPA, 766 F.2d at 1315-16. TRPA adopted the required thresholds in 1982, and in 1984, TRPA adopted a new regional plan.

Because it did not include sufficient implementation measures to ensure attainment of the adopted environmental thresholds, the 1984 regional plan was immediately challenged by the State of California and the League to Save Lake Tahoe. California v. TRPA, 766 F.2d 1308. Finding that the congressionally-approved 1980 Compact required TRPA to demonstrate that new development did not impede the attainment of the environmental thresholds, the district court issued an injunction that effectively prohibited any new development approvals in the Basin pending adoption of a valid plan. The ninth circuit affirmed. Id.

The ninth circuit's decision in California v. TRPA emphasizes the role of TRPA and its land use planning process in controlling the adverse environmental impacts of development

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Section I.E., infra.

[7] For a discussion of the limits of the 1969 Compact, see Fink, supra, at 506-07.

[8] The League to Save Lake Tahoe was actively involved in the formulation of the 1980 Compact.

in the Tahoe Basin. Specifically, the ninth circuit held that the 1980 Compact requires TRPA not only to adopt environmental threshold carrying capacities for the Tahoe Basin, but also to ensure that these thresholds are met. Id. at 1313, 1315-16 (quoting 1980 Compact art. v(g)).

**b. TRPA's 1987 Regional Plan Represents the Consensus of Most Constituencies in the Tahoe Basin.**

With the 1984 issuance of the district court injunction, conflict over development versus environmental protection in the Tahoe Basin reached its peak. In an effort to break an impasse that had characterized the Tahoe land use planning process since the 1969 Compact, TRPA convened a consensus process to develop a new regional plan. This consensus workgroup was composed of all the key constituencies affected by TRPA planning decisions, including representatives of federal, state, and local governments, the League, the Tahoe-Sierra Preservation Council, the North and South Shore Chambers of Commerce, the League of Women Voters, and the Tahoe Sierra Board of Realtors. See preface to Goals and Policies, supra. The consensus workgroup met for a year and, for the most part, was able to agree on the policies and goals that should guide development in the Basin; the recommendations of the consensus workgroup were adopted by the TRPA Governing Board in 1986 and implemented in TRPA's 1987 regional plan and Code of Ordinances. Fink, supra, at 508.

The agreements of the consensus workgroup established the basic framework for the land use program that now regulates petitioner's property. This 1987 regional plan does not represent a dramatic departure from earlier programs to regulate land use in the region, but builds on these prior efforts. For example, the consensus workgroup developed a new land capability rating system for residential parcels to replace the Bailey system. This new program, the Individual Parcel Evaluation System (or "IPES"), required a lot by lot analysis of the suitability of parcels for residential development throughout the Basin. Each lot was



then assigned a point score based on its development suitability. Building on the land use classification techniques developed under the Bailey system, IPES determined suitability for development based on the parcel's erosion hazard, runoff potential, accessibility, water influence areas, condition of the watershed, ability to revegetate, and need for water quality improvements in the vicinity of the parcel. Goals and Policies, supra, at VII-4. Each lot was given an IPES score after a site visit by a team of experts consisting of a soil scientist, a watershed expert, and a planner. Fink, supra, at 510.

Under the 1987 regional plan, 2,000 lots were permitted to be developed for residential use during the first six years of the Plan. Id. at 509. Lots required a minimum IPES score of 725 to be eligible for development. Kelly v. Tahoe Regional Planning Agency, No. 22913, Slip. Op. at 8 (Nev. Sup. Ct., July 8, 1993), Appellate R. 66A. This minimum IPES score was established based on the recommendation of a technical advisory committee and was designed to ensure that the minimum score was immediately above the ranking of the most sensitive parcels. Goals and Policies, supra, at VII-6. However, as agreed during the consensus process, local county jurisdictions could lower this minimum eligibility number provided that, among other things, the jurisdiction could show that it had implemented a water quality monitoring program and made "demonstrable progress" towards installing water quality improvements in that jurisdiction. Id. Thus, under the 1987 regional plan and IPES, parcels originally classified as undevelopable because they had scores below the minimum IPES cut off point could become eligible for development.

The other key area of agreement reached through the consensus process included support for the transfer of development rights program now challenged by petitioner. Goals and Policies, supra, at VII-14 to VII-17; Code of Ordinances, supra, ch. 20, J.A. at 45-57.

Thus, contrary to petitioner's arguments, TRPA's decision to prohibit development in stream environment zones is not arbitrary (Petitioner's Brief, supra, at 23), but is one element

of a "complex and extremely comprehensive," Fink, supra, at 509, regulatory system grounded in scientific fact and political consensus. The exercise of TRPA's regulatory authority to prevent water pollution and to protect a sensitive natural resource falls within the realm of important governmental interests that justify even stringent land use regulations. TRPA's plan balances the need to protect fragile resources with the desire to preserve private property rights. Under this program petitioner's attempt to establish a taking fails.

### D. Petitioner's Property Retains Substantial Value And Under The TRPA Program, Petitioner Has Valuable Property Rights.

Petitioner purchased her property on September 7, 1972 for $4,500. Stephen R. Johnson & Associates, Inc., Tahoe Basin Act Land Acquisition Program Appraisal Summary and Certification, Assessor's Parcel No. 130-211-31, at 6 (Oct. 9, 1989) [hereinafter Suitum Appraisal].[9] On March 16, 1990, the State of Nevada offered petitioner $35,000 for her property as part of its land acquisition program established after the 1987 regional plan was adopted.[10] Supplemental Johnson Aff. ¶ 12, J.A. at 141. As mandated by

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[9] This appraisal was conducted by the State of Nevada in 1989 in response to petitioner's expression of interest in selling her property to the State.

[10] Amici criticize TRPA for failing to use state acquisition programs "to purchase the remaining undeveloped lots in the Mill Creek drainage . . . ." See, e.g., TSPC Brief, supra, at 16. TRPA does not control the state land acquisition programs, and in any event, as the record shows, Nevada did make an independent offer to purchase petitioner's property under its acquisition program. J.A. at 141. Indeed, Appendix C to the amicus brief submitted by Tahoe-Sierra Preservation Council indicates that numerous parcels in petitioner's subdivision were purchased by Nevada or the United States, while petitioner chose to retain her parcel.



Nevada law, this offer represents the fair market value of petitioner's property on July 1, 1980, prior to the adoption of the 1980 Compact. 1985 Nev. Stat. 585, § 7, amended by 1987 Nev. Stat. 444 § 3.[11] The appraisal assumed petitioner could build a home on her property. Suitum Appraisal at 4. The offer was not accepted.

As fully discussed in the parties' briefs, petitioner possesses several property rights under the TDR program. These include the rights to:

1. Compete for and transfer a residential development allocation.

2. Transfer up to four residential development rights, including up to three bonus rights.

3. Transfer the land coverage rights that would otherwise be allowed on her property to owners of developable lots.

These rights have a value that has been estimated to range between $40,000 and $51,500. Suitum v. Tahoe Regional Planning Agency, 80 F.3d 359, 363 (9th Cir.), cert. granted 117

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[11] Amicus Curiae Institute for Justice asserts that the Nevada offer is an attempt to buy petitioner's property for less than its fair market value. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 14-15. However, petitioner was offered $35,000 for a lot that she purchased for $4,500. The 1980 valuation date used by the State of Nevada generally represents the peak value of property in the Basin prior to implementation of the 1987 regional plan, and ensures that lots are purchased based on their pre-regulation value. Fink, supra, at 522 n. 258, (citing Dept. of Conservation and Natural Resources, Nev. Div. of State Lands, Final Report and Recommendations of the Commission on Land Acquisition in the Tahoe Basin 69 (1987)).

S.Ct. 293 (1996).[12] The extent of the permissible use of petitioner's property has not yet been determined because she has not attempted to obtain or transfer any of these entitlements; however, it is clear that the development rights give petitioner substantial value in her property.

Although petitioner characterizes the TDR program as a "ruse," (Petitioner's Brief, supra, at 30), at least one amicus appearing in support of petitioner has recognized the value of TDRs. At public legislative hearings in Nevada, a representative of the Tahoe-Sierra Preservation Council complained that "the cost of a residential development right is close to $30,000" and therefore too expensive. Minutes of the Meeting of the Legislative Commission's Committee to Continue the Review of the Tahoe Regional Planning Compact at 14 (June 6 & 7, 1994) (testimony of Mary Gilanfarr, Executive Director, Tahoe-Sierra Preservation Council). As a result, the Council urged the State of Nevada to sell the development rights associated with parcels the state had purchased under its land acquisition program, in order to lower the prices of development rights currently sold on the open real estate market. Id.

Evidence in the record supports the observations of Ms. Gilanfarr that TDRs have been sold for considerable value. Supplemental Johnson Aff. ¶ 13, J.A. at 141-43. In 1993, at the time petitioner's action was before the district court, several residential allocations had been sold in the Incline Village area of Washoe County (where petitioner's property is located) at prices ranging from $17,000 to $25,000 each. Id. ¶ 13(b), J.A. at 142.[13] Also in 1993, 56 residential allocations plus

[12] The manner in which the TRPA program creates a market for these developments rights is discussed below in Section II.

[13] Although none of the 1993 transfers were from unbuildable properties that received allocations through the TRPA 1993 drawing (Petitioner's Brief, supra, at 5 n.5), the evidence produced by TRPA demonstrates that there is a market for TDRs.



development rights were in escrow in Incline Village for $32,000 each. Id. ¶ 13(c), J.A. at 142.

Moreover, TDRs continue to sell in the Tahoe Basin and in Washoe County in particular. According to the TRPA permit database,[14] 27 residential allocations were transferred in the Basin between 1994 and 1996. Of these, five were in Washoe County. TRPA's public records show that 45 development rights, 17 of which were located in Washoe County, were transferred during that same period. Further, between 1994 and 1996 a lot owner seeking a transferable residential allocation for a property below the IPES line stood a very good chance of receiving it. In 1995, for example, six residential allocation rights were available to undevelopable properties in Washoe County, and only five lot owners sought them. Once again, in 1996, all of the parties that sought residential allocation were awarded one; four of these allocations were transferred to other properties. Thus, it is factually incorrect to argue, as petitioner does, that the TDR program is a "ruse" or that her application to transfer development rights under this program would have been meaningless.

### E. The TRPA Program Has Not Interfered With Petitioner's Reasonable Investment Expectations.

As stated above, petitioner's takings claim is defeated by the substantial value her property retains. Moreover, her claim must be evaluated in light of her reasonable expectations. Penn

Furthermore, and contrary to petitioner's claim (id.), the record shows that residential development rights from parcels located in stream environment zones have been transferred to other lots. Scholley Aff. ¶ 15, J.A. at 148.

[14] TRPA retains a daily log of all permit applications. Scholley Aff. ¶ 13, J.A. at 147. This database is a public record. 1980 Compact, art. III(i).

Central, 438 U.S. at 130-31. Again, this inquiry fails to support petitioner's takings theory.

At the time petitioner purchased her property, TRPA had already begun to implement its first regional plan and land use development ordinance for the Basin. This program incorporated the Bailey system, and imposed a temporary moratorium on development on the 82 percent of lands in the Basin which were classified under Bailey as sensitive class 1, 2, 3 lands or stream environment zones. Fink, supra, at 506 n.139. The 1971 plan and 1972 ordinance followed years of study of water quality problems in the Basin and regulatory action to mitigate these problems, such as the prohibition on sewage disposal in the Basin and the adoption of the first Tahoe Regional Compact in 1969. The prohibitions now applicable to petitioner's property are not inconsistent with those set forth in the land use plans that were in effect at the time petitioner purchased her property.

Petitioner asserts, without any factual support in the record, that her land was designated as land capability classification 6 under the Bailey system. Petitioner's Brief, supra, at 2 n.1. Although in 1971 TRPA published a map of land capabilities classifying broad geographic areas according to the Bailey system, this map was not determinative of an individual parcel's suitability for development under the Bailey system. As specifically stated on the map,

> This study does not suggest that development should occur on the locations shown. It merely reveals which lands meet the criteria that have been selected. In addition, because of the scale of the map and the maps from which it was compiled, land capability levels within individual map units may not be uniform. For example, flat valley floors locally contain riparian zones along stream courses that meet the criteria for class 1b [stream environment zone], although shown on the map as class 7. It is therefore necessary that the final land capability classification for individual parcels should be based on detailed site evaluation and more detailed application of the land capability criteria.



Lake Tahoe Basin Land Capabilities, Planning Guide Map, 1971, prepared by U.S. Forest Service and TRPA. Thus, as specifically announced by TRPA, the Land Capability Map did not indicate all areas, such as stream environment zones, that were subject to the coverage restrictions established under the Bailey system.

The Supreme Court of Nevada in an unpublished 1993 opinion reviewed and rejected a claim that the development restrictions of the 1987 regional plan effected a taking. Kelly, Slip.Op., Appellate R. 66A. Nevada Court based its holding in part on its conclusion regarding the reasonable expectations of a 1966 purchaser of land in the Basin. It determined that early studies about the environmental problems associated with rapid growth at Lake Tahoe were sufficient to provide a property owner who purchased land in the Basin in 1966 with "adequate notice that his development plans might be frustrated." Id. at 15. The Kelly court also held the plaintiff's property retained substantial value even though the 1987 Plan prohibited development on multiple parcels owned by plaintiff. Id.

In sum, and contrary to petitioner's characterization, the TDR system is an integral part of a regulatory program developed over many years in response to serious environmental problems that have threatened the very attribute that makes Lake Tahoe such a valuable natural and economic resource. This system was not suddenly dropped on property owners in 1987 and certainly it was not developed as a way to circumvent Lucas. TRPA's regulatory program strikes a balance between advancing the important governmental interests at stake in preserving the quality of the Lake, and accommodating the rights of property owners. As such, the 1987 regional plan, including the TDR program, represents a constitutionally valid regulatory system.

## II. THE TAHOE PROGRAM ACHIEVES AN UNPARALLELED RECIPROCITY OF ADVANTAGE AMONG PROPERTY OWNERS IN THE BASIN.

The 1987 regional plan assures an economic "reciprocity of advantage" to all parties. This Court has determined that such "reciprocity of advantage" is a significant consideration justifying a regulatory system. Pennsylvania Coal, 260 U.S. at 415; see Lucas, 505 U.S. at 1018. The current Tahoe program, forged out of years of political conflict and then consensus in the Basin, is explicitly designed to balance "the benefits and burdens," Penn Central, 438 U.S. at 124, of residents in the Basin in order to protect the resource upon which the entire community depends -- and which is of considerable importance to the entire nation.[15]

Certainly, the 1987 regional plan includes many stringent provisions governing land use in the Basin; petitioner, however, is not the only person who must bear the burden of these regulations. Every person, every business, and all the local governments in the Basin live with TRPA's strict environmental regulations, and they do so because protection of Lake Tahoe is critical to the value of their land and the viability of the regional economy. In addition to the development restrictions at issue here, key elements of the 1987 Plan include a general prohibition on new subdivisions of land in the Basin, Goals and Policies, supra, at II-9; a limitation on new commercial development to a total of 400,000 square feet during the first 10 years of the Plan, id. at VII-12; a limit of 300 new residential units to be permitted each year, (Barnett Aff. ¶ 10, J.A. at 98); strict limits on the amount of impervious surface coverage for new development, Goals and Policies, supra, at II-13; the requirement that capital improvement projects by local governments (such as road building) include best management practices to control runoff, id. at VII-21; and a requirement that new and existing developments pay mitigation fees for erosion and runoff control projects, id. at VII-17. The TRPA program also requires owners of existing development that exceeds the new coverage standards to reduce coverage on environmentally sensitive properties as a condition of modifying their existing improvements. Fink, supra, at 511.

The land use system at Lake Tahoe also includes several features designed to mitigate the economic impacts of TRPA's regulatory program on those property owners who would be most adversely impacted by certain provisions, such as the prohibition on construction in stream environment zones. For example, Nevada and California and the United States Forest Service all have land acquisition programs. Id. at 513. In the past 15 years, these ongoing programs have spent over $200 million to acquire environmentally sensitive parcels throughout the Tahoe Basin. Chris Bowman and Patrick Hoge, Runoff, Air Pollution Cloud Waters of Crystal-Clear Lake, Sacramento Bee, Dec. 8, 1996, at A8.

The TDR element of the 1987 regional plan, as endorsed by members of the consensus workgroup, is also designed to distribute the burden of the TRPA regulatory program. This TDR program balances the benefits and burdens of the Tahoe regulatory system, because many of the restrictions that affect all property owners create incentives for the purchase of transferable rights. For example, the limit on the number of residential allocations issued each year creates a market for the sale of allocations. Property owners who cannot build on their land may still compete for and sell residential allocations, which command a substantial sum in the market. Supplemental Johnson Aff. ¶ 13, J.A. at 141-43; see also Section I.D., supra. Similarly,

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[15] The governmental interest in preservation of the environmental balance at Lake Tahoe is heightened by the fact that more than 70% of the land in the Basin is publicly owned. Tahoe Regional Planning Agency, Water Quality Management Plan for the Tahoe Region 8 (adopted Nov. 30, 1988); see Kleppe v. New Mexico, 426 U.S. 529 (1976) (federal government has broad power to regulate private property affecting public lands). In complying with its responsibility under the Congressionally-adopted 1980 Compact to achieve specified environmental thresholds, TRPA is carrying out the federally sanctioned effort to regulate land use for the protection of important publicly owned property and resources.

TRPA generally grants only one residential development right per legal lot; however, owners of property designated for multi-family residential development may build an additional unit for each development right that they buy from another property owner. Scholley Aff. ¶ 14, J.A. at 147. Owners of land in stream environment zones are eligible for up to 3 bonus development rights, which they are permitted to sell under the TDR program. Id. ¶ 15, J.A. at 148. Finally, owners of buildable property who wish to add more than the land coverage permitted under IPES, may do so by buying coverage rights from other property owners. Barnett Aff. ¶ 5, J.A. at 96. Under this regulatory system, property owners with buildable lots are motivated to buy necessary allocations, development rights, and coverage rights, creating a market that benefits property owners, like petitioner, with unbuildable stream zone land.

Moreover, property owners are not the only parties who have participated in mitigating the impacts of development on the Lake. In addition to the $200 million spent so far on land acquisition, government agencies have invested more than $100 million in projects designed to reduce erosion from roads in the Basin. Bowman & Hoge, supra, at A8. Recently, voters in California and Nevada authorized bond measures that will make another $30 million available for water quality improvements in the Tahoe Basin. See TSPC Brief, supra, at 16 n.6. This considerable (and continuing) expenditure of public money has gone to remedy a problem caused largely by private development. Fink, supra, at 538-39.

Finally, as set forth in the goals and policies of the 1987 TRPA Regional Plan, which reflects the agreements reached during the consensus process, "[m]aintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, education, scientific, natural and public health values provided by the Lake Tahoe Basin." Goals and Policies, supra, at I-1. As recognized by the Nevada Supreme Court when addressing a property owner's challenge to TRPA's development restrictions on his land, "'every single one of Mr. Kelly's lots will eventually diminish in value if Lake Tahoe is despoiled. IPES is a burden, surely, but it also conveys



significant personal benefits to each landowner it serves.'" Kelly, slip op. at 15, Appellate R. 66A.

The best evidence of the beneficial impact of the TRPA program on property values, even those that cannot be built upon, is that found in the record below. The evidence produced below indicates that, under the 1987 regional plan, the value of petitioner's transferable development rights (including the right to sell an allocation) was between $40,000 and $51,500--for an investment of $4,500. Suitum, 80 F.3d at 363; see also Suitum Appraisal, supra, at 6. Although petitioner's property might be more valuable if she were permitted to build upon it and the rest of the existing regulatory system remained in place, it is not at all clear that her property would be more valuable without the system altogether.

If it were not for the considerable regulatory efforts made to reduce the impacts of development on the Lake, the very characteristics that make Lake Tahoe such a desirable and valuable place to live and own property would be destroyed. Recognition of this fact led to the compromises that now form the basis of TRPA's regulatory program. This program has become an accepted fact of life for most property owners and environmentalists in Lake Tahoe, who have after years of debate struck a balance between "'upgrading the community and environmental benefits.'" Chris Bowman & Patrick Hoge, Sides Agree on Plan for Mountain Mecca, Sacramento Bee, Dec. 8, 1996, at A1. Clearly, the effort to protect the environmental resources of Lake Tahoe has involved commitments and sacrifices by everyone in the Basin; it is not a burden shouldered disproportionately by individual property owners, and it is not a burden shouldered disproportionately by petitioner.

## CONCLUSION

For the reasons set forth above, amicus curiae the League to Save Lake Tahoe respectfully requests that this Court affirm the ruling of the Ninth Circuit Court of Appeals.

Dated: January 8, 1997

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

*Petitioner,*

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICI CURIAE PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, JAMES M. STROCK, SECRETARY OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS P. WHEELER, SECRETARY OF THE CALIFORNIA RESOURCES AGENCY ON THE MERITS IN SUPPORT OF TAHOE REGIONAL PLANNING AGENCY

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Amici respectfully files this brief in support of respondent, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

## INTEREST OF AMICI

California's interest in this case is multifaceted, and can be summarized as follows:

1. Lake Tahoe is a national treasure which, by fortunate geographic accident, happens to be located within the borders of California and its sister State of Nevada. While Congress has recognized Lake Tahoe's unique values and taken several steps toward its preservation, principal responsibility for this natural resource lies with those two states and the bistate agency they have created, the Tahoe Regional Planning Agency (TRPA).

California entered into the bistate Tahoe Regional Planning Compact with Nevada in 1968, and amended that Compact in 1980, for the express purpose of addressing Lake Tahoe's undisputed environmental decline. Through the Compact, ratified by the Congress, California committed itself to an interstate program of cooperative regional planning for the Lake Tahoe Basin. Over the past decade, moreover, California taxpayers have spent over $100 million in an effort to halt and reverse the environmental deterioration of the Lake Tahoe Basin. The State of California thus has an important stake in guaranteeing the continued viability of this unique and irreplaceable resource, and in furthering the Compact's vital objectives.

2. While not a party in the *Suitum* case, California is currently defending litigation – both in the Lake Tahoe Basin and elsewhere – in which identical legal issues are

being advanced.[1] The Court's decision in the present case thus has the potential to directly affect pending litigation to which California is a party. Accordingly, California has a major interest in insuring that its legal and policy views are presented to the Court.

3. California's current population of over 32 million people – as compared to approximately 20 million in 1970 – is expected to exceed 36 million residents by the end of the century. (California Department of Finance, *Population Estimates for California Cities and Counties* (1996); California Department of Finance, *Projected Total Population of California Counties*, 1990-2005 (1991).)

At the same time, California possesses a finite amount of land for its citizens to inhabit, and a wide array of unique natural and cultural resources. As Justice Oliver Wendell Holmes sagely observed nearly a century ago, the public interest in its natural resources is "omnipresent wherever there is a State, and grows more pressing as population grows."(*Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).) Justice Holmes' admonition applies with particular force to California, its 58 counties and nearly 500 cities, which are struggling to balance the economic needs of their citizens against their fiduciary and sovereign obligation to preserve California's natural and cultural resources for future generations.

In recent years, California's state and local governments have embarked upon a series of important initiatives designed to strike that balance in an appropriate and equitable manner. These measures, which include a

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[1] See, e.g., Tahoe Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency, et al., Case Nos. CIV-N-84-257-ECR, CIV-N-92-98-ECR (D. Nev.) (regulatory takings litigation brought by Lake Tahoe property owners against TRPA, California and Nevada challenging TRPA's 1987 Regional Plan).



wide array of transfer of development rights (TDR) programs, conservation banking concepts, and Natural Communities Conservation Planning (NCCP) initiatives, are described in more detail below. A common theme of these programs, however, is that they are designed to help California and its political subdivisions shape development patterns in a manner not possible solely through traditional forms of regulation. As a result, market incentives have been introduced into California's resource management process, thereby allowing property owners to benefit from greater flexibility and enhanced economic values. These California programs simultaneously promote important community objectives by avoiding land use conflicts and furthering key natural resource objectives.

An adverse ruling in this case on the ability to use TDRs and other market tools could seriously undermine these nationally-recognized efforts by California and its political subdivisions to incorporate increased flexibility into their regulatory programs, while at the same time providing long-term preservation of California's exceptional environment and cultural resources.

Adoption of petitioner's sweeping reformulation of takings jurisprudence – that the Constitution requires that each and every discrete parcel of private property be allowed to be developed – is at fundamental variance with these important California initiatives. Fortunately, such a result is neither consistent with public policy nor faithful to applicable legal principles.

## SUMMARY OF ARGUMENT

## ARGUMENT

The parties and their respective *amici* have thoroughly examined the question of ripeness and the manner in which that procedural doctrine applies to the present litigation. California will therefore not address

that issue, focusing its attention instead on distinct legal and policy questions raised by this important case.

## I.

## LAKE TAHOE IS A UNIQUE AND FRAGILE PUBLIC RESOURCE, THE ENVIRONMENTAL AND ECONOMIC VIABILITY OF WHICH IS DIRECTLY THREATENED BY ILL-CONSIDERED DEVELOPMENT OF FRAGILE LANDS IN THE TAHOE BASIN.

### A. The Unique Nature of Lake Tahoe.

Lake Tahoe is an exceptionally pure and beautiful natural resource, the crown jewel of the Sierra Nevada mountain range. An early visitor to Tahoe, Mark Twain, described the lake as:

> "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea . . . with the shadows of the mountains brilliantly photographed upon its still surface . . . the fairest picture the whole earth affords." (*Roughing It* [Harper & Roe], at p. 156.)[2]

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[2] Elsewhere, Mark Twain describes the waters of Italy's famous Lake Como as "a bedizened little courtier" compared to Lake Tahoe:

> "It certainly is clearer than a great many lakes, but how dull its waters are compared with the wonderful transparence of Lake Tahoe! . . . . People talk of the transparent waters of the Mexican Bay of Acapulco, but in my own experience they can not compare with those I am speaking of. I have fished for trout in Tahoe, and at a measured depth of eighty-four feet I have seen them put their noses to the bait and I could see their gills open and shut. I could hardly have seen the trout themselves at that distance in the open air. . . . " (*The Innocents Abroad* [1966 Signet Classic edition], at p. 146.)



The United States Senate more recently depicted Lake Tahoe as:

> "famed for its scenic beauty and pristine clarity. . . . Only two other sizable lakes in the world are of comparable quality – Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the Soviet Union." (S. Rep. 91-510, 91st Cong., 1st Sess., pp. 3 and 4 (1969).)

State courts and legislatures have come to similar conclusions. The Supreme Court of California, for example, characterized the Lake Tahoe Basin as "an area of unique and unsurpassed beauty. . . . " (*People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 485, 96 Cal.Rptr. 553, 487 P.2d 1193 (1971).) The Supreme Court of Nevada recently explained that Lake Tahoe's waters are "extremely clear," and characterized the lake as "a national treasure." (*Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 641, 649, 855 P.2d 1027 (1993), *cert. denied*, 510 U.S. 1041 (1994).) In adopting the 1980 Tahoe Regional Planning Compact, the California and Nevada legislatures found that "The region exhibits unique environmental and ecological values which are irreplaceable." (Pub.L. No.96-551, 94 Stat. 3233 (1980).)

### B. Development of Environmentally Sensitive Lands is Steadily Polluting Lake Tahoe.

Lake Tahoe's allure, however, may ultimately be the source of its demise. Pollution caused by poorly-directed development is causing the lake to lose its world-renown clarity. Reviewing the relevant evidence, for example, the Supreme Court of Nevada concluded that the lake's visibility is declining by almost half a meter per year due, in large part, to uncontrolled development. (*Kelly, supra*, 109 Nev. at 641, 644.) The U.S. Court of Appeals for the Ninth Circuit likewise found that the lake's water quality is deteriorating at an "alarming rate" (*People of California v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1316 (CA9

1985).) And a California appellate court concluded that uncontrolled development such as that proposed by petitioners threatens to turn "the lake from clear blue to turbid brown." (*Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.*, 210 Cal.App.3d 1421, 1425, 259 Cal.Rptr. 132 (1989).) The federally-approved California/Nevada water quality management plan reported that the lake's clarity decreased by 20% from 1962 to 1988. (1988 Water Quality Management Plan for the Lake Tahoe Region, Volume I, at p. 72 ["Water Quality Plan"].) That plan was prepared and adopted by TRPA, certified by California and Nevada, and approved by the federal Environmental Protection Agency pursuant to section 208 of the federal Clean Water Act. (33 U.S.C. § 1288.)

The loss of Lake Tahoe's water quality is caused by two factors: inflows of polluting nutrients and sediments, and the lake's virtually permanent retention of these pollutants. The nutrients (primarily nitrogen and phosphorus – see *Water Quality Plan* at p. 74) cause algae to grow, while sediments both contain algae-feeding nutrients and cause turbidity. (See *Water Quality Plan* at pp. 8-88, *Tahoe-Sierra Preservation Council, supra*, 210 Cal.App.3d at 1427-1429; and *Kelly, supra*, 109 Nev. at 641 for more detailed descriptions of this process.) Although nutrients and sediments occur naturally, absent development virtually none would enter the lake. (*Water Quality Plan* at p. 63; *Kelly* at 641.) This is due, in significant part, to the natural treatment capacity of stream environment zones. (*Water Quality Plan* at pp. 60, 64 and 94.) Scientific studies have found, for example, that these wetlands remove almost 75 percent of dissolved nitrogen, 86 percent of dissolved phosphates, and 94 percent of sediments which enter the wetlands. (*Id.* at p. 60.) Development of these fragile areas, however, destroys their purifying properties. (*Ibid*; *Tahoe-Sierra Preservation Council, supra*, 210 Cal.App.3d at 1427-1428.)

Moreover, unlike most lakes, which can self-purify as fresh water flows in and contaminated water flows out,



the amount of water which enters and leaves Lake Tahoe is minuscule. If the lake were drained, it would take approximately 700 years to be refilled. (See Ayer, "Water Quality Control at Lake Tahoe," 1 Ecology Law Quarterly 3, 8 (1971).) The 1988 Water Quality Plan thus concludes that "[a]s a reasonable rule of thumb, one may employ the approximation that sediments and nutrients discharged to Lake Tahoe remain there forever, either suspended in the water column or settled on the bottom." (*Water Quality Plan* at p. 74.)

The pollution of this exceptional lake harms California by threatening both the region's beauty and its economy. It also directly impairs the State's sovereign interests, since California owns the two-thirds of the lakebed, together with the waters which lie within the state. (*Fogerty v. State of California*, 187 Cal.App.3d 224, 232, fn. 3, 231 Cal.Rptr. 810 (1986), *cert. denied*, 484 U.S. 821 (1987) [lakebed]; California Water Code § 102 [waters]; *Water Quality Plan* at p. 8 [approximately two-thirds of Lake Tahoe located within California].)

### C. California Has Undertaken a Number of Important Fiscal and Regulatory Steps to Halt and Reverse the Continuing Pollution of Lake Tahoe.

Alarmed by the permanent loss of its invaluable resources, California spent or authorized for expenditure well over $100 million (not including overhead costs) from 1985 through mid-1996 for land acquisition, site improvements, and other capital projects designed to protect the waters of Lake Tahoe from further degradation and to help restore watersheds on the California side of the Tahoe Basin. Considerably more than $40 million of this total was for soil erosion control and water quality projects, including construction of infrastructure, revegetation, and various other site improvements, as well as public acquisition of easements and other interests in land. Almost $68 million was spent or allocated to acquire environmentally sensitive lands on the California

side of the basin – lands which, if developed, would have caused increased erosion and degradation of the waters of the lake. California spent over $5 million for other resource protection and management programs and projects intended to benefit the water quality of Lake Tahoe. Within the latter category is the California Tahoe Conservancy's "Land Coverage and Marketable Rights Program" (described in greater detail below), under which California purchases parcels of land in urgent need of preservation, and restricts them from future development, thereby generating ground coverage and other marketable rights for sale to permit applicants. And in November 1996, California voters approved the expenditure of an additional $10 million for land purchases and restoration to improve Lake Tahoe's water quality.

These expenditures, while massive, are nonetheless insufficient to fully remedy the environmental problems currently facing Lake Tahoe. Public agencies must also "regulate the uncontrolled development that would likely ensure the permanent loss of Lake Tahoe to eutrophication in the near future . . . " (*Kelly, supra*, 109 Nev. at 644.) The problem is exacerbated by the fact that many of these environmentally sensitive lands in the Tahoe Basin are in private ownership. California and Nevada therefore entered into (and Congress ratified) the 1980 Tahoe Regional Planning Compact to provide a regulatory counterpart to taxpayer-funded public works and acquisition programs of the type described above. The Compact requires that TRPA develop a regional plan which "shall provide for attaining and maintaining federal, state, or local air and water quality standards, whichever are strictest. . . . " (Pub.L. No. 96-551, 94 Stat. 3233 (1980).) TRPA has done so. It has developed a sophisticated land use plan which steers development away from extremely fragile lands and towards less sensitive lands which can be developed without polluting Lake Tahoe.



## II.

## UNDER WELL-SETTLED PRINCIPLES OF TAKINGS JURISPRUDENCE, THIS CASE MUST BE ANALYZED UNDER THE MULTI-FACTORED ANALYSIS IDENTIFIED BY THE COURT IN *PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY*.

Petitioner and her amici insist that the result in this case is controlled by the Court's recent decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). That contention is manifestly incorrect.

In *Lucas*, the Court made two important clarifications to takings jurisprudence. First, in the "extraordinary circumstance" where government regulation has deprived a landowner of *all* economically viable use of the affected property, there is a presumption that a compensable taking has occurred. (505 U.S. at 1017-18.) Second, that presumption is properly overcome, and government regulation which totally eliminates economic use will be sustained, in at least two related circumstances: a) when the proposed use of private property contravenes traditional notions and limitations contained in state property law; and b) where government's refusal to permit the proposed use is necessary to forestall threats to the lives or property of others. (505 U.S. at 1027-1030.)

*Lucas*, however, is simply inapplicable to the present facts. That is because the relevant evidence in the record below demonstrates that the TDRs applicable and available to the subject property, even viewed in isolation from the parcel's worth attributable to other factors, provide substantial economic value. Accordingly, both *Lucas* and this Court's other regulatory takings decisions indicate that a very different analysis is compelled under the Takings Clause.

The appropriate constitutional standard in litigation such as the present case was instead provided by the Court in its landmark decision, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), a precedent

curiously overlooked by petitioner. *Penn Central* instructs that in the case of government regulation challenged under the Takings Clause which *reduces* but does not *eliminate* economic value, an "essentially ad hoc, factual inquir[y]" is required. (438 at 124.) Factors noted by this Court as being especially relevant to this ad hoc inquiry are: 1) the economic impact of the regulation on the property owner; 2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and 3) the character of the governmental action. (*Ibid.*)

As the Court reaffirmed in *Lucas*, the *Penn Central* analysis remains fully applicable to the vast majority of regulatory takings cases, in which *reduction* rather than *elimination* of economic value is involved. Such cases warrant the judiciary's indulging in the "usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' . . . in a manner that secures an 'average reciprocity of advantage to everyone concerned.' " (*Lucas*, 505 U.S. at 1017-1018 (citing *Penn Central*, 438 U.S. 104, 124; and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).)

The Court's most recent regulatory takings precedents similarly reaffirm the continuing applicability of the *Penn Central* standard to the vast majority of takings cases (i.e., those dealing with "diminution" of use and value rather than the "total taking" found to exist in *Lucas*). (*Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 2316 n.6; *Concrete Pipe & Prod. v. Const. Laborers Pension Trust*, ___ U.S. ___, 113 S.Ct. 2264, 2290-2292 (1993).)

It is the amici's contention, however, that the TDR system put in place by TPRA preserves substantial value in petitioner's property and rights thereto. Therefore, under the Court's precedents, no taking has occurred under the Fifth Amendment.



## III.

## TRANSFER OF DEVELOPMENT RIGHTS (TDR) AND RELATED PROGRAMS ARE A WELL-RECOGNIZED ELEMENT OF MODERN LAND USE PLANNING, CALIFORNIA AND ELSEWHERE. SUCH PROGRAMS ARE A RELEVANT FACTOR IN GAUGING WHETHER A REGULATION EFFECTS A TAKING OF PRIVATE PROPERTY.

When an agency such as TRPA has been directed by federal and state law to plan for the conservation of a unique and priceless treasure such as Lake Tahoe, the legal mechanisms available to it are several. It may, relying on established background principles of state law of property and nuisance, prohibit such harmful action without compensation. (*Lucas, supra*, 505 U.S. at 1027-1030; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 479, 488-491 (1987).) Alternatively, it may reject traditional "command and control" principles in favor of a different, market-oriented approach. In providing marketable development rights transferable to less sensitive lands in the Tahoe Basin, TRPA has taken the latter course. And that course has already been approved by this Court.

The last time the Court examined TDRs (in 1978), it held that "the [TDR] rights . . . undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." (*Penn Central, supra*, 438 U.S. at 137.)

This observation is fully consistent with the Court's emphasis in *Lucas* on the economic use of land. Economic reality makes value, rather than use on site, the appropriate test for a regulatory taking. As the Court noted in *Lucas*, 505 U.S. at 1017: " '[F]or what is the land but the profits thereof[?]' " (quoting 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812)). Similarly, Justice Kennedy noted in his concurring opinion in *Lucas* the relevance to the

regulatory takings inquiry of "significant market value resale potential." (505 U.S. at 1033-1034 (Kennedy, J., concurring.))

**A. TDR Measures of the Type Contained in TRPA's Regional Plan and Analogous Programs Are a Well-Established and Recognized Element of Land Use Planning by the State of California, Its Political Subdivisions, and Other Jurisdictions Throughout the United States.**

**1. The Nature and Function of TDR Programs Generally.**

TDR programs have been used widely in California and elsewhere in the United States for more than a generation. TDR systems have been employed by many different levels and entities of government, including local, state, and – as in the case of TRPA – regional planning agencies. Such programs have been used to help protect a range of significant resources: scenic shoreline areas; fragile terrain at high risk from fire and flooding; zones of endangered vegetation; freshwater aquifers; important wetlands such as the Florida Everglades; agricultural lands; and buildings of major historic or cultural importance. (See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); see generally, Rick Pruetz, *Putting Transfer of Development Rights to Work in California*, Chaps. II and III (Solano Press 1993).)

The details of these various TDR programs vary widely, both in their rules and procedures, and in the roles which they play within the land-use planning process. Such programs do, however, share at least two underlying characteristics:

a) *TDR programs allow for more effective land-use planning*. When certain sites or parcels are not well suited for new development because of the likely impact of development on a sensitive resource, TDR programs provide a mechanism



for the planning body to protect that resource, while allowing and encouraging the use of the same increment of development on another site, where it will not undermine the objectives of a general or regional plan.

b) *TDR programs provide an important, additional option for landowners*. Since transferable development rights may be bought and sold, the rights will tend to flow to those locations where they will earn the highest economic return within the framework of local or regional planning guidelines. In some cases, the transfer of development rights may actually maximize the economic return to the transferor, if the transferor's expected increment of development is worth more at an eligible receiving site than it would be worth in place. For a given parcel of land, a transfer of development rights, at any given time, may or may not maximize economic return; as in the outright sale of land, the result depends on market conditions and other factors. But, whichever the case, TDRs unquestionably provide a landowner with a new and significant "avenue" to the marketplace, for the purpose of realizing the economic value of land. (Pruetz, *supra*; David Callies, *Preserving Paradise: Why Regulation Won't Work*, pp. 96-98 (U. Hawaii Press 1994); Joseph DiMento (ed.), *Wipeouts and Their Mitigation: The Changing Context for Land Use and Environmental Law*, pp. 67-81 (Lincoln Inst. of Land Policy 1990); *cf.* Sohn and Cohen, "From Smokestacks to Species: Extending the Tradable Permit Approach From Air Pollution to Habitat Conservation," 15 Stanford Environmental L.J. 405 (1996).) The existence of land use options such as those reflected in TDR systems, as an incident to the ownership of land, is appropriately taken into account when the

impact of regulation on the land is being considered.

**2. The TDR Program at Lake Tahoe, and California's Role in Implementing It.**

Under the Regional Plan adopted by the TRPA in 1987, several different types of TDRs have been recognized at Lake Tahoe. Among them are: ground coverage rights; residential building allocations; residential development rights; commercial floor area rights; and tourist accommodation units. (TRPA Code of Ordinances, Ch. 20.) Each of these transferable rights is a mechanism for stabilizing one element of growth within the Tahoe Basin, so as to assure that the development which does occur will not exceed regional carrying capacities, or prevent the attainment of the "environmental thresholds" set forth in the bistate Compact. The transferable rights are credited to parcels of land based on the presence of structures or other development which is eligible to be retired, or the potential for future development under current TRPA ordinances. Any transferable right may be used by the landowner who is credited with it on another parcel which is eligible to receive an additional increment of development; or may be sold to another party for use on any eligible receiver parcel. Many transferable rights have in fact been sold between private parties in this fashion at Lake Tahoe, sometimes by individuals dealing with each other at arms' length, in other instances through brokers or other intermediaries.

The California Tahoe Conservancy (Conservancy), a land conservation agency of the State of California active on the California side of the Tahoe Basin (Cal. Govt. Code § 66905 et seq.), operates a Land Coverage and Marketable Rights "bank." That bank complements the TDR programs of the TRPA. Through the bank, the Conservancy buys parcels of land which are of high priority for restoration or protection, and which have been credited with ground coverage and other transferable development



rights by TRPA. The Conservancy then sells transferable development rights from the acquired parcels to members of the public and other users, both public and private. These sales are made at publicly-announced prices, set by appraisal or other valuation study, or at public auction. The acreage from which the rights have been drawn is permanently retired, i.e., withdrawn from the pool of developable parcels. When it is required under TRPA guidelines, the Conservancy physically restores the land.

The Conservancy's bank assists the operation of TRPA's TDR programs, and advances the resource protection goals of TRPA's Regional Plan, by assuring that there is an active market for TDRs within the Tahoe Basin. The Conservancy program also helps landowners whose projects are otherwise consistent with TRPA and local ordinances to meet permit conditions and requirements. The Conservancy assists the private market, not only by acting as a source of supply through its public sales of coverage, commercial floor area, and other rights; but also by carrying out these sales at publicly announced prices, which provides a market benchmark for landowners who contemplate purchasing or selling such rights in their own, private transactions. The overall result has been to facilitate a large and varied marketplace for transferable rights.

In the nearly 10 years that the Conservancy "bank" has been operating, the Conservancy has provided 73,106 square feet of transferable ground coverage rights for private projects, in 210 separate transactions; and over 1,800 square feet of commercial floor area rights for commercial projects. An additional 13 coverage transactions have been completed between the Conservancy and public agencies, involving a total of 41,012 square feet of coverage rights. While the Conservancy is a large-scale seller of coverage, it by no means monopolizes the market for these rights; a large number of coverage transactions have also occurred in the private market. For TDRs

other than coverage rights, there is an active private market in place which is the main source of supply.

### 3. Other TDR Programs Operated By the State of California and its Political Subdivisions.

In California, other state and local agencies have similarly made use of transfer of development rights over the past 20 years. At the state level, the California Coastal Commission has for many years overseen a "transferable development credit" (TDC) program in portions of the Los Angeles County coastal zone, encompassing Malibu and part of the Santa Monica Mountains. The Commission instituted this TDC program as a means of addressing the cumulative impact of new residential units and land divisions within the coastal zone.

Under the TDC program, permit applicants in the designated receiver areas, located nearest to roads and other infrastructure, have been able to obtain development approvals on the condition that they obtain TDCs. The TDC procedure results in the permanent retirement of existing but as-yet-undeveloped lots in nearby mountainous areas. At the same time, the availability of an immediate economic return has provided a strong incentive for many lot owners in the sending areas to relinquish their development rights.

Since its formal adoption in 1979, the Commission's TDC program has resulted in the permanent retirement of well in excess of *500* parcels, making it one of the most active TDR programs in the nation. The Coastal Commission program has been supported, over many years, by the California Coastal Conservancy, another state agency which operated a TDC bank similar in concept to the Tahoe Conservancy program described above. (Pruetz, *supra*, pp. 53-55.) A California appellate court recently characterized the Santa Monica Mountains/Malibu TDC programs as "a well-established mechanism by which the Commission, as well as other local governmental entities, attempts to balance a private property owner's ability to



obtain development permits with the state's interest in protecting natural resources from unbridled development." (*Ojavan Investors, Inc. v. California Coastal Commission*, 26 Cal.App.4th 516, 520-521, n. 3, ___ Cal.Rptr.2d ___, ___, n.3 (1994) (citing numerous prior federal and state court decisions on the legal efficacy of TDR programs).)

A similar program is in place which protects one of our nation's most scenic routes – Highway One along California's coast. All areas visible from Highway One and its major public viewing areas are defined in Monterey County's local coastal plan as the Big Sur Critical Viewshed. No development whatsoever is allowed with the Critical Viewshed. (Critical Viewshed Ordinance, Big Sur Coast Land Use Plan, §§ 3.2.1, 3.2.2, 3.2.3 (November 5, 1985).) Through innovative transferable development programs by state and local governments, owners of buildable lots within the Critical Viewshed can qualify their property and receive development credits that can be used anywhere else in the County. (Transfer of Development Credits Ordinance, Monterey County Coastal Implementation Plan, Title 20, Ch. 20.156 (January 5, 1988).)

A key point, however, is that most TDR programs in California and elsewhere are operating at the *local* government level. One planning expert recently surveyed California's local jurisdictions and determined that over two dozen different TDR programs have been developed in the 1980's and 90's and are currently in effect. (Pruetz, *Putting Transfer of Development Rights to Work in California*, *supra*, at pp. 41-82.) This wide array of TDR programs allow California's local communities to achieve a variety of land use goals (including preservation of natural areas, hillsides, historic landmarks and agricultural land, as well as promoting new housing and redevelopment). They simultaneously preserve landowner profits, make local regulatory programs more flexible and generally

promote "win-win" solutions for the private and public sectors alike. (*Ibid.*)[3]

TDR and TDC programs enable state and local governments in California to shape development patterns in a manner not possible through traditional, prescriptive regulatory formulas. By introducing market incentives to the process of land use regulation, private landowners gain greater flexibility and economic value. Simultaneously, community goals such as avoiding nuisance-type land use conflicts and furthering key natural resource objectives are advanced. In communities throughout California, TDR-type programs have created opportunities for exchanges between private parties that have maximized the common welfare and eliminated issues of economic conflict.

**4. The State of California Has Developed A Number of Analogous, Market-Oriented Initiatives. These Systems, Like TDR Programs, Foster Flexible, Non-Prescriptive Methods Which In Turn Both Promote Public Objectives and Private Economic Opportunities.**

In recent years California has developed a number of market-oriented resource initiatives analogous to TDR programs and which are designed to promote similar public/private partnerships. California is concerned that a broad decision by this Court casting doubt on the

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[3] This is not to suggest that TDR programs are unique to California. To the contrary, such programs operate across the nation. Prominent examples of successful TDR programs operating in other states include: New York City's historic landmarks preservation ordinance; Collier County, Florida's program to preserve open space and ecologically sensitive coastal areas; and the New Jersey Pinelands TDR program, designed to preserve significant environmental and agricultural areas within a wetlands and forest preserve located in that state. See Pruetz, *supra*, at pp. 29-39.



constitutional efficacy of TRPA's TDR program could undercut these other state resource initiatives.

Some of the more significant such programs currently administered by California include the following:

– *California's Natural Communities Conservation Planning (NCCP) Program.* The NCCP program is designed to promote a more proactive, less intrusive, and more market-oriented approach to traditional command and control species preservation. (See Calif. Fish & Game Code § 2800 et seq.) California's widely-praised NCCP initiative is predicated on the concept of facilitating development in certain areas in exchange for preserving other undeveloped properties as species habitat. (See, e.g., New York Times, February 27, 1996; Chicago Tribune, June 11, 1995; Los Angeles Times, April 17, 1996.)

– *Conservation Banks.* Presently in California, there are in existence or in the process of being created 39 conservation banks composed of thousands of acres of wildlife habitat – land worth at least $40 million – in 12 California counties. These include three conservation banks in Northern California, ten in Central California and 26 in Southern California. One prominent example is ARCO's award-winning, 6,000 acre Coles Levee Ecosystem Reserve in Kern County. (1994 Innovations in State and Local Government Award Winner: Granted by the Ford Foundation and the John F. Kennedy School of Government, Harvard University; see Fresno Bee, September 17, 1994.) There a division of ARCO is facilitating its continuing oil and gas operations by selling credits to other landowners in the Southern San Joaquin County, and helping to implement the Metropolitan Bakersfield Habitat Conservation Plan. In turn,

Kern County is using (and other local governments are designing) TDR programs in support of their local habitat preservation efforts where actual habitat values are assigned parcels and then sold as development rights. (See Draft Kern County Valley Floor Habitat Conservation Plan Program (Alternatives Subcommittee Report, April 14, 1994); Implementation/Management Agreement by and among the U.S. Fish and Wildlife Service, California Department of Fish and Game, City of Bakersfield and County of Kern (August 15, 1994); Kern County Ordinance No. G-5998 (August 9, 1993); for a general overview of California's conservation banking initiatives and related measures, see *Innovative Tools for Natural Resource Management* (California Resources Agency and California Department of Fish and Game, June 1996).)[4]

– *Wetlands Mitigation Banking Programs.* An example of these programs is the wetlands mitigation banking program administered by California's Department of Fish and Game in the Sacramento-San Joaquin Valley. (See Calif. Fish & Game Code § 1775 et seq.) This state legislation encourages partnerships to make landowner incentive programs and cooperative planning efforts the primary focus of wetlands conservation and restoration. Such wetlands

[4] Conservation banking is not only for wealthy oil company landowners. In San Diego County, the Boys and Girls Clubs of East County Foundation are helping to finance their continuing programs for area youth by creating the two-phase San Vicente Conservation Bank on a 1,500-acre former cattle ranch. In western Placer County, a private entrepreneur has created Wildlands, Inc., a 315-acre preserve of wetland and riparian habitat funded by the sale of credits for the mitigation of Sacramento area development projects.



mitigation banking programs have been a central tenet of California Governor Pete Wilson's California Wetlands Conservation Policy (August 23, 1993).

– *Water Banking, Transfer and Marketing Programs.* California has recently adopted pioneering initiatives relating to waterbanking, transfer and marketing. The general objective of these programs is to promote more efficient use of California's finite water supplies and more regulatory flexibility for California's water rights system. (See, e.g., Calif. Water Code § 470 et seq. (Water Transfer Act of 1986).) Among the vital elements of the Wilson Administration's current waterpolicy are water marketing and transfers. California's State Water Bank, for example, has demonstrated the value of water transfers since the bank's initiation in 1991, when 800,000 acre feet were marketed. Following its successful first two pilot years, the bank was made a permanent feature of California's water supply system. As recently as 1995, over 200,000 acre feet of water were transferred from willing sellers to willing buyers to help alleviate the impact of the record drought conditions.

Important regulatory reform efforts such as those summarized above provide value in uses other than development of specific property. For example, land conservation banks provide a mechanism that assigns a monetary value to habitat, which in turn allows a landowner to obtain a financial return for conserving rather than developing his or her land. This in turn allows the private and public sectors to harness market forces to improve significantly upon traditional command and control methods of protecting and restoring wildlife habitat.

TDRs, pollution credits, conservation and mitigation banking are emerging as sophisticated resource management tools built on several foundations. In contrast, project-by-project mitigation of adverse environmental effects often involves lengthy regulatory processes and significant costs for private landowners seeking project approvals. The above-described regulatory reform initiatives greatly ease such burdens, often reducing compliance with environmental requirements to a single transaction. They additionally give landowners the certainty of having complied with legally-mandated mitigation requirements. Most importantly, these tools often allow landowners to recoup a higher value for their land than would otherwise be possible. (See below.) The availability of credits (whether termed development, conservation, habitat or pollution) makes the protection of habitat or wetland an economic asset that can be bought or sold by any third party.

**B. Regulatory Systems Such as TRPA's TDR Program Confer Economic Value on Private Property. Accordingly, Such Programs Are Fully Relevant to the Constitutional Question of Whether Private Property Has Been Unconstitutionally "Taken" Under the Fifth Amendment.**

A feature common to many of the market-oriented programs identified above is the fact that they provide economic value to affected private property interests. That is especially true with respect to TRPA's TDR program, both generally and as applied to petitioner's parcel. The factual evidence cited by the courts below underscores the point.

Accordingly, such programs – and, specifically, their economic impact on the affected property – are fully relevant to the "ad hoc, factual inquiry" mandated by *Penn Central* and this Court's related regulatory takings decisions. Ignoring their direct bearing on the takings



inquiry, as petitioner and her amici urge the Court to do, would flatly contravene those established precedents.

**C. The Court Should Not, Through the Extreme Interpretation of the Takings Clause Advanced by Petitioner, Undermine the Important Advances Exemplified by TRPA's TDR Program. State and Local Governments Should Instead Be Encouraged to Continue to Develop Such "Win-Win" Regulatory Solutions.**

Less intrusive and more market-oriented regulatory systems such as the TDR program developed by TRPA have many salutary features, as noted above. Given the expanded opportunities they afford private and public sectors alike, such programs constitute sound public policy. It would therefore be especially unfortunate if an unsupported and extreme construction of the Takings Clause were allowed to undermine those programs. Yet that is precisely the result advocated by petitioner and her amici in this case.

As noted above, the vast majority of such non-traditional forms of resource management and regulation are being formulated at the *state* and *local* government level. That is not surprising. As Justice Brandeis sagely noted over a half century ago:

> "There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs.
>
> . . . .
>
> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. *It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . .* " (*New State Ice Co. v. Liebmann*, 285

U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added).)

The critical, federalism-based themes advanced by Justice Brandeis in 1932 apply with equal force today.

Justice Kennedy identified a related concern in his concurring opinion in *Lucas*, one dealing directly with regulatory takings principles. There Justice Kennedy opined on "the exercise of regulatory power in a complex and interdependent society." (505 U.S. at 1035 (Kennedy, J., concurring.)) Focusing on the proper scope of the police power in the face of newfound resource demands, he observed: "The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source." (*Ibid.*)

That states such as California have the power and responsibility to evolve their respective laws governing real property within their jurisdictions is apparent from a consistent line of Supreme Court precedents. (See, e.g., *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977) ("Whether as rules of property, it would now be safe to change these doctrines . . . is for the several States themselves to determine"); *Lucas, supra*, 505 U.S. at 1017, n.7.)

Petitioner contends that programs such as TRPA's TDR system are simply irrelevant to the constitutional inquiry before this Court. That argument is legally insupportable, for the reasons set forth above. Additionally, however, acceptance of petitioner's theory would seriously compromise important regulatory programs such as TRPA's, in favor of the more traditional "command and control" systems that afford private and public interests alike with fewer options and opportunities. (See generally, "Law and Economics Symposium: New Directions in Environmental Policy," 13 Columbia J. of Env. Law 153 (1988); Joseph DiMento (ed.), *Wipeouts and Their*



*Mitigation: The Changing Context for Land Use and Environmental Law* (Lincoln Inst. of Land Policy 1990).) This Court should not countenance such a result.

## IV.

## ASSESSMENT IN THIS CASE OF THE "CHARACTER OF TRPA'S REGULATORY ACTION" AND PETITIONER'S "REASONABLE INVESTMENT-BACKED EXPECTATIONS" FURTHER CONFIRMS THAT NO COMPENSABLE TAKING CAN BE DEMONSTRATED IN THIS CASE.

The economic impact of TRPA's regulatory program and the means of assessing that impact have been a central focus of this litigation. California has addressed those points above, and they have been thoroughly analyzed by the parties and other amici.

Nevertheless, reference to the two other specific criteria identified by the Court in *Penn Central* as relevant to the regulatory takings inquiry further demonstrate the lack of merit to petitioner's legal claim. It is to those standards that California now briefly turns.

### A. Under Longstanding California Property Law, Private Landowners Possess No Right to Pollute Publicly-Owned Waterways Such as Lake Tahoe.

California has previously described how the disturbance of environmentally-fragile lots in the Lake Tahoe Basin produces a scientifically-documented, causal and deleterious effect on the lake's water quality. The potential development of the petitioner's lot and the cumulative impacts of developing similarly-situated parcels would seriously impair water quality. It is for that reason that TRPA, along with other state and federal officials, have taken steps to restrict such development.

The authority to take police power measures of this type to forestall water pollution is a longstanding principle of California property law. The landmark California

case on this point is the century-old decision in *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 394 (1897). There the California Supreme Court upheld an injunction, on public nuisance grounds, barring the continued operation of a private sawmill that polluted the Truckee River.

The same principle was at the heart of California's first major environmental battle – the fight by California farmers and urban dwellers to halt the downstream flooding and destruction triggered by hydraulic mining in the Sierra Nevadas. In *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152 (1884), the California Supreme Court sustained a permanent injunction against a hydraulic mining company whose extractive activities had triggered this widespread pollution. A federal court came to the identical conclusion in the same year, in a similar factual setting. (*Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (1884); for a general account of the legal and political battles over hydraulic mining in nineteenth century California, see Kelley, *Gold v. Grain* (1959).)

The essential point is that it is a well-settled and longstanding principle of California property and nuisance law that private parties such as petitioner have no right under California law to utilize their upland property in a manner which pollutes public waterways. Accordingly, private property owners in the Tahoe Basin simply have no reasonable, investment-backed expectation that they are free under the U.S. Constitution to do so. (*Lucas, supra; Penn Central, supra,* 438 U.S. at 124.)



**B. Even Long-Accepted Use of Private Property Can Be Proscribed Through Government Regulation When Scientific Advances, Newly-Obtained Knowledge and the Like Demonstrate the Nuisance-Like Nature of Such Private Conduct.**

Petitioner nonetheless maintains that her desire to build a private residence on her upland parcel represents a traditional,well-established land use that perforce cannot be proscribed consistent with constitutional principles. Again, petitioner is mistaken, especially given the unique circumstances of the present case.

First, land uses which are fully proper in one context can be absolutely inappropriate in another. As this Court so aptly noted in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), "A nuisance may be merely a right thing in the wrong place, – like a pig in the parlor instead of the barnyard."

Such is the case here. Residential development which is to be permitted and even fostered in certain circumstances can and must be precluded in others. One example suggested by the Court's *Lucas* decision aptly demonstrates the latter situation: a private structure proposed to be built astride an earthquake fault. Construction of a private residence in a location that will pollute or obstruct adjacent, publicly-owned waterways, as in this case, is another.

Second, California's legal history is replete with examples of state property law being invoked to preclude private activities previously considered to be reasonable and appropriate land uses. The above-described state and federal court decisions in *People v. Gold Run Ditch & Mining Co.* and *Woodruff*, respectively, spelled the end of the gold mining industry – an activity that had previously formed the centerpiece of California's economy. (See generally, *Gold v. Grain, supra.*) Similarly, 100 years ago the California Supreme Court enjoined otherwise legal timbering operations when the destructive effects of that activity in a particular location became apparent.

Finally, it is not dispositive that the causal relationship between development on stream environment zones in the Tahoe Basin and the pollution of Lake Tahoe only became known relatively recently. In retrospect, it certainly would have been preferable if the scientific knowledge demonstrating that linkage had been discerned before *any* development had occurred in stream environment zone. The fact that it was not, however, cannot compel regulators to compound the problem by allowing the same, deleterious acts to be repeated over and over again. As this Court noted in *Lucas, supra,* "changed circumstances or new knowledge may make what was previously permissible no longer so." (505 U.S. at 1031 (citing the Restatement (Second) of Torts); see also, *id.* at 1035 (Kennedy, J., concurring).) And the quotation employed a half century ago by Justice Rutledge in *Wolf v. Colorado*, 338 U.S. 25, 47 (1949) remains apt: " 'Wisdom too often never comes, and so one ought not to reject it merely becomes it comes late.' "

### C. Government Has Relatively Broad Authority Under the Takings Clause to Protect Unique Public Resources Such as Lake Tahoe From Injury or Destruction.

A final, necessary factor that must be considered under *Penn Central* is the character of the governmental action being challenged under the Takings Clause. (*Keystone, supra,* 480 U.S. 470, 488-493.) In this instance, both the nature of the environmental threat TRPA is confronting and the unique character of the public resource being protected tip the constitutional inquiry heavily in TRPA's favor. Government has relatively greater authority under the Takings Clause to regulate under the police power to address threats to unique and irreplaceable public resources than is the case with respect to more commonplace types of property. (See, e.g., *Lucas, supra,* 505 U.S. at 1035) (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system



that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit"); *Hunziker v. State of Iowa*, 519 N.W.2d 367 (Iowa 1994) (state restriction on development of privately-owned Indian burial site held valid; no right under Takings Clause to develop such property under long-standing principles of state law); *cf. Associated Home Builders v. City of Livermore*, 18 Cal.3d 582, 617, 135 Cal.Rptr. 41, 61, 557 P.2d 473, ___ (1976) (Mosk, J., dissenting) ("Limitations on growth may be justified in resort communities, beach and lake and mountain sites, and other rural and recreational areas; such restrictions are generally designed to preserve nature's environment for the benefit of all mankind. They fulfill our fiduciary obligation to posterity. As Thomas Jefferson wrote, the earth belongs to the living, but in usufruct").)

It is perhaps stating the obvious that Lake Tahoe constitutes the prototypical public asset which allows – indeed, demands – heightened efforts to protect the lake's unique and imperiled resources. The Takings Clause presents no constitutional bar to such salutary efforts by TRPA and others.[5]

---

[5] For the above stated reasons, TRPA's restrictions on the subject property would pass constitutional muster under the "state property/nuisance law exception" to the "total takings" presumption, as articulated by the Court in *Lucas*. Inasmuch as the same result obtains under the distinct (and far more relevant) *Penn Central* multifactored analysis, however, it is unnecessary for the Court to address the constitutionality of the TRPA regulations under the *Lucas* standard.

## CONCLUSION

As to the issues discussed herein, the decision of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Dated: January 9, 1997

Respectfully submitted,

*Counsel for Amicus Curiae*

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No. 96-243

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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BERNADINE SUITUM,
*Petitioner,*
v.
TAHOE REGIONAL PLANNING AGENCY,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether petitioner's as-applied regulatory takings claim is ripe when the merits of that claim turn on her contention that the transferable development rights (TDRs) to which she is entitled are a "ruse" lacking any market value, yet she has declined to make any effort to sell those TDRs she already possesses, to exercise her opportunities to obtain additional TDRs, or to apply for agency approval of any TDR sales.

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## INTEREST OF THE *AMICI CURIAE*

*Amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in the substantive and procedural law of regulatory takings. State and local governments are responsible for most of the land-use regulation in this country, and modern regulatory takings law has focused on land-use regulation. This case, involving a takings challenge to a program of land-use regulation designed to preserve a threatened natural resource, falls squarely within that focus. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

## STATEMENT

In 1989, petitioner Bernadine Suitum applied to respondent Tahoe Regional Planning Agency (TRPA) for permission to construct a house on her land in Incline Village, Nevada. First Amended Complaint, J.A. 15. Experts engaged by TRPA inspected the land and discovered that it was covered with riparian plants and saturated with groundwater within two feet of the surface. TRPA Internal Memorandum, Aug. 5, 1990 (Ex. 2 in Support of Opp. to Def.'s Motion for Summary Judgment). Aerial photographs confirmed that the water was natural runoff from higher elevations, which flowed along a drainage channel along the back of the land and into Lake Tahoe. *Id.*

Scientists have determined that when landowners cover riparian land like Suitum's with impermeable surfaces such as pavement or building foundations, they discharge nutrient-filled water downstream. *See Kelly v. Tahoe Regional Planning Agency*, 855 P.2d 1027, 1028-29 (Nev. 1993), *cert. denied*, 510 U.S. 1041 (1994). These discharges harm lakes such as Lake Tahoe because they cause algae to grow, clouding the lake water. *See id.* at

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

1029. Lake Tahoe has had clear water for about 10,000 years. *See id.* at 1028. In 1984, an expert estimated that the increase in nutrient-filled discharges in the Lake Tahoe Basin, if unchecked, would lead to loss of Lake Tahoe's clarity in 40 years. *See California ex rel. Van De Camp v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1312-13 (9th Cir. 1985).

In order to limit landowners' production of these discharges, TRPA adopted a set of regulations limiting "land coverage"—the placement of impermeable surfaces on land—in Lake Tahoe Basin. Regulations applicable to land such as Suitum's, located in what TRPA terms a "stream environment zone" (SEZ), allow virtually "no new land coverage." Order of District Court, Nov. 23, 1993 (1993 Order), J.A. 86-87; Ex. B to Aff. of S. E. Scholley in Support of Motion for Summary Judgment (Scholley Aff.) (excerpt from Regional Plan For The Lake Tahoe Basin, Goals And Policies, Tahoe Regional Planning Agency, Sept. 17, 1986), J.A. 26-27.

As a means of preserving some of the development opportunities that SEZ landowners would otherwise lose due to these regulations, TRPA implemented a transferable development right (TDR) program. The TDR program enables SEZ landowners to transfer certain rights to other qualifying parcels of land in the area, allowing more intensive or earlier development of those parcels than would otherwise be permitted. Because TRPA has found it important to limit (1) the total land coverage in the Lake Tahoe Basin, (2) the total number of residences, and (3) the rate of residential development, the TDRs have three components, corresponding to these three aspects of regulation: Land Coverage Rights, Residential Development Rights, and Residential Allocations. TRPA's Memorandum Concerning Its Transfer Of Development Program (TRPA TDR Mem.), J.A. 91-93; Aff. of S. E. Scholley in Support of Motion for Summary Judgment (Scholley Aff. II), J.A. 144, 145. A landowner who



wishes to build on land needs all three of these components. Scholley Aff. II, J.A. 145. TRPA regulations credit Suitum with 183 square feet of Land Coverage Rights and one Residential Development Right (representing one single-family house or unit). TRPA TDR Mem., J.A. 92; Scholley Aff. II, J.A. 145. Suitum is also eligible to apply for a Residential Allocation in the annual drawing in which they are distributed, and to receive three bonus Residential Development Rights if she agrees to record permanent covenants restricting her property. Scholley Aff. II, J.A. 145-48.

Suitum sued TRPA in the district court, claiming that the application of TRPA regulations to her land constituted a taking of private property for public use without just compensation. First Amended Complaint, J.A. 16. TRPA moved for summary judgment, arguing that Suitum's takings claim was not ripe.

The district court ordered the parties to submit supplemental briefs on the specific issue whether Suitum's failure to pursue sale of her TDRs rendered her takings claim unripe. Suitum's only argument in her supplemental brief was that the TDRs were worthless, rendering pursuit of their sale a futile act. Plaintiff's Response to TRPA's Mem. Concerning TDR Program, Court Record (CR) 77, at 1-2. The district court, however, found inadmissible the only evidence Suitum offered to support her assertion that the TDRs were worthless.[2] TRPA, by contrast, presented credible expert testimony that the TDRs had substantial value. Appraiser Stephen R. Johnson estimated that Land Coverage Rights were worth between $6.00 and $12.00 per square foot, Affidavit of S. R. Johnson in

[2] Suitum's evidence was the affidavit of Paul Kaleta, a former TRPA employee whom Suitum belatedly sought to qualify as an expert witness. The district court found that Kaleta was not qualified to give expert testimony on the valuation of TDRs (or on other aspects of TRPA regulation). Pet. App. C-2 n.1. That finding was affirmed by the court of appeals, *id.* at A-11, and was not challenged in Suitum's petition for certiorari.

Support of Motion for Summary Judgment (Johnson Aff.), J.A. 131-32, that Residential Development Rights were worth between $1500 and $6000 per unit, and that Residential Allocations were worth between $9000 and $20,000 each. Supplemental Affidavit of S. R. Johnson in Support of Motion for Summary Judgment (Suppl. Johnson Aff.), J.A. 142-43.

On this evidence, the district court rejected Suitum's futility argument, and held that her takings claim was not ripe because the value of the TDRs was "significant to the takings calculus" announced by this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and remained uncertain so long as Suitum made no attempt to sell the TDRs. 1994 Order, J.A. 152. The *Penn Central* takings analysis, of course, is the "ad hoc, factual inquir[y]," *Penn Central*, 438 U.S. at 124, that this Court has prescribed for cases that do not fall within per se takings categories such as the "deni[al of] all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The district court specifically noted that Suitum's land might have "significant residual value" apart from the value of the TDRs, confirming that it assumed the appropriate framework for deciding the underlying takings issue was the ad hoc approach announced in *Penn Central*. 1994 Order, J.A. 152.

On appeal, Suitum failed to challenge the district court's assumption that the value of the TDRs was relevant to her takings claim. Instead, she continued to argue that any attempt to sell the TDRs would be futile because the TDRs were worthless. Appellant's Opening Br. 19-21, 26; Reply Br. of Appellant 5-6. In rejecting her appeal on the ripeness issue, the court of appeals made clear that it, like the district court, presumed that the underlying takings claim would eventually be analyzed under the *Penn Central* test. As the court noted after citing *Penn Central*, " 'determining whether a regulatory action effects a taking requires complex factual assessments of the purposes and economic effects of government actions.' " Pet. App. A-7 (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 924 (1994)).



## SUMMARY OF ARGUMENT

The only issue properly presented in this case is whether Suitum's as-applied takings claim is ripe. This Court can decide that issue by determining whether Suitum's failure to apply for transfer of her development rights has left uncertain the overall impact on Suitum of TRPA's land-use regulation, so that a court cannot determine the effect of the regulation "on the value of [Suitum's] property and investment-backed profit expectations." *Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 (1985).

Suitum acknowledges that the Court can decide the ripeness issue within this settled framework. Pet. Br. 24-29. But she has devoted the bulk of her petition and brief to the argument that the Court should leave its settled framework behind, and use the ripeness issue as an opportunity to further elaborate the substantive law of takings. In particular, Suitum urges this Court to redefine the per se takings category announced in *Lucas*, to encompass not only a right to economically beneficial use, but an indefensibly broader right to place impermeable cover on land or build a house on "residential property." Pet. Br. 32. Suitum then entreats the Court to declare that the provision of transferable development rights could never save a land-use restriction that would otherwise fall into the newly augmented *Lucas* per se category. *Id.* at 32-34.

Suitum's failure to present these arguments to either court below—extending to a failure even to mention *Lucas*—has left this case without the factual findings necessary to present as live issues these serious matters of substantive takings law. *Amici* believe that the orderly

development of substantive takings law would be ill-served by an attempt to address such matters outside a concrete factual context. Thus, although *amici* agree with respondent that Suitum's claim is not ripe, *amici*'s long-term interest in the orderly development of substantive takings law leads to a particular interest in demonstrating that the ripeness issue in this case can and should be decided without advisory pronouncements on substantive takings issues.

## ARGUMENT

### I. *LUCAS* IS IRRELEVANT TO THE RIPENESS OF SUITUM'S TAKINGS CLAIM

The court of appeals held that Suitum's failure to pursue sale of her transferable development rights rendered her takings claim unripe. In her petition and brief on the merits, Suitum attacks the court of appeals' judgment with an entirely new argument, which neither court below had the opportunity to address. Suitum now claims that, without the provision of the TDRs, TRPA's regulation of her land would have deprived it of all economically beneficial use, causing that regulation to fall into the per se takings category recognized in *Lucas*. Pet. Br. 1, 2, 30-32; *see Lucas*, 505 U.S. at 1015. In fact, neither court below had occasion either to make or to reject such a finding, since Suitum's reference to *Lucas* in her petition is the first mention of *Lucas* in the history of this case. Having refashioned her claim as a *Lucas* per se takings claim, Suitum then argues that her failure to market the TDRs does not render her claim unripe because TDRs are irrelevant to *Lucas* per se takings claims. Pet. Br. 12-15, 32-34.[3] Suitum's belated attempt in this Court to recast

[3] A portion of Suitum's brief can be read as arguing that TDRs are irrelevant to the issue of ripeness even if they are relevant to the underlying substantive takings claim. Suitum points to language in this Court's decisions noting that a landowner's takings claim is not ripe if she "has not yet obtained a final decision regarding how [she] will be allowed to develop [her] property," *Williamson County*, 473 U.S. at 190, because a court, before adjudicating a takings claim, must know "the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). This language, Suitum argues, indicates that the ripeness inquiry focuses solely on the uses allowed on the parcel the landowner claims has been taken, and excludes TDRs. Pet. Br. 12-15.

Suitum's reading of *Williamson County* and *MacDonald, Sommer & Frates*, however, confuses the general principle of those cases with its application to their particular facts. The general principle is that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. On the particular facts of each case, neither of which involved TDRs, a court would indeed know "how far the regulation[s went]" when it knew "the type and intensity of development legally permitted on the subject property." *Id.* at 348. But in cases in which TDRs "are to be taken into account in considering the impact of regulation," *Penn Central*, 438 U.S. at 137, a court must know their quantity and value to know "how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. Suitum's apparent suggestion to the contrary makes no sense, as it would force a court to decide a takings claim with incomplete information.



her case as a child of *Lucas*, however, is not only procedurally inappropriate, but substantively flawed.

Suitum does not challenge this Court's holding in *Penn Central*, 438 U.S. at 137, that TDRs must be considered in ordinary takings analysis. Therefore, to lay a foundation for her argument, she must first establish that TRPA's restrictions on the use of her land, without the TDRs, would in fact work a per se taking under *Lucas*, removing her case from the ordinary *Penn Central* inquiry. But Suitum's failure to develop her *Lucas* argument at any earlier stage of this litigation has produced a record that cannot support this claim under any reasonable interpretation or elaboration of *Lucas*. As demonstrated below, Suitum's property is neither valueless nor useless, and *Lucas* cannot reasonably be expanded to protect an absolute right to place impermeable cover on land or to build a house on "residential property."

Thus, this case exhibits in extreme form the defects that have made this Court reluctant to consider arguments advanced for the first time in a petition for certiorari. Suitum has asked this Court to consider her principal argument, not only "without the benefit of a full record," *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552 n. 3 (1990), but without the benefit of a record that supports an essential step in that argument. She has requested this Court to proceed, not only without "the benefit of . . . lower court opinions squarely addressing" her argument, *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992), but without the benefit of *any* lower court reflection on that argument. Faced with such irremediable defects, this Court can and should resolve the ripeness issue presented in this case without addressing complex, fact-intensive questions about the treatment of transferable development rights in a *Lucas* per se takings inquiry.

### A. TRPA's Regulations Have Not Rendered Suitum's Land Valueless

*Lucas* requires, as an essential predicate for a taking, a finding that regulation has left land without any market value. In *Lucas*, a South Carolina trial court had found that state regulation had rendered Lucas's beachfront land "valueless."[4] 505 U.S. at 1007, 1020. According to the *Lucas* Court, the question presented in *Lucas* was whether this "dramatic effect on the economic value of Lucas's lots" caused the regulation to run afoul of the Takings Clause. *Id.* at 1007. Lucas's claim, elaborated the Court, concerned the State's "*complete extinguishment* of his property's value," *id.* at 1009 (emphasis added); previous Supreme Court cases were distinguishable because

[4] Four Justices questioned the correctness of this finding. *See Lucas*, 505 U.S. at 1033-34 (Kennedy, J., concurring in the judgment); *id.* at 1043-44 (Blackmun, J., dissenting); *id.* at 1065 n.3 (Stevens, J., dissenting); *id.* at 1076 (statement of Souter, J.).



"[n]one of them . . . involved an allegation that the regulation *wholly eliminated* the value of the claimant's land." *Id.* at 1026 (emphasis added).

*Lucas*'s focus on the economic value of the claimant's land necessarily means that the very same regulation may work a categorical taking as applied to one parcel of land, but not as applied to another. For example, a law that permitted land to be used only for cattle grazing and did not credit landowners with any transferable rights might leave a rural parcel with considerable economic value; indeed, cattle grazing might be the *most* valuable use of the parcel. Yet the same law might render an urban lot completely valueless. If the constitutionality of a single law can vary from case to case, so much more can the constitutionality of two laws that are similar, as Suitum argues the TRPA regulations and the *Lucas* beachfront restrictions are. These differing outcomes, however, do not expose a weakness of *Lucas*'s focus on value; they reveal its strength. As the *Lucas* Court noted, although the Takings Clause may protect "a number of noneconomic interests," this Court's cases have long placed protection of "the productive use of, and economic investment in, land" at the center of Takings Clause jurisprudence. *Id.* at 1020 n.8. The *Lucas* category is designed to identify the circumstances under which the impact on those economic interests will trump other considerations normally relevant to takings analysis. That impact will necessarily differ from case to case.

If the *Lucas* per se category protects market value, Suitum's claim that TRPA's restrictions work a per se taking fails, because neither district court findings nor record evidence support a conclusion that Suitum's property lacks market value. To the contrary, the district court explicitly acknowledged that, even if Suitum had completed a transfer of the development rights associated with her parcel, the land might have "significant residual

value." 1994 Order, J.A. 152. This acknowledgment was undoubtedly prompted by the testimony of appraiser Johnson that provided the only admitted evidence about the value of Suitum's parcel. Johnson testified that parcels similar to Suitum's had sold for between $7,125 and $18,750 after being encumbered with open space easements that were more restrictive than the TRPA regulations applicable to Suitum's land. Johnson Aff., J.A. 123, 132; Ex. A to Suppl. Johnson Aff. (District Ct. Docket Entry No. 90). Johnson also testified that two similar parcels with intact development rights had sold for $25,000 and $32,000. Suppl. Johnson Aff., J.A. 143.

Because there is no evidence in the record about the value of a buildable lot in Suitum's subdivision—another indication of the immature factual development of this case—the diminution in value caused by the TRPA restrictions (disregarding the value of the TDRs) is subject only to a very rough estimate. Tax assessment records available for nine of the approximately twenty lots on Mayhew Circle, the street on which Suitum's land is located, indicate that in 1993 the "Market Land Value" of each lot (excluding the value of improvements) was assessed at $104,417.[5] If Suitum's land, subject to TRPA

[5] These records are available in the NVOWN file of the ASSETS library in the LEXIS online database. Some of the lots are slightly smaller than Suitum's, and some are slightly larger. (Suitum's lot is approximately 18,300 square feet in size. *See* Affidavit of Lyn Barnett in Support of Motion for Summary Judgment, J.A. 96, 97. Its street address is 159 Mayhew Circle, *see* Pet. Br. 2, placing it between 155 Mayhew Circle and 165 Mayhew Circle.) All of the lots are assessed at the same "Market Land Value," indicating that the assessment is a rough one:

| Address | Square Footage | 1993 Market Land Value | Year House Constructed |
|---|---|---|---|
| 121 Mayhew Cir. | 22000 | $104,417 | 1965 |
| 125 Mayhew Cir. | 20700 | $104,417 | 1965 |
| 130 Mayhew Cir. | 15200 | $104,417 | 1973 |
| 142 Mayhew Cir. | 15500 | $104,417 | 1965 |
| 143 Mayhew Cir. | 17400 | $104,417 | 1979 |
| 151 Mayhew Cir. | 17500 | $104,417 | 1980 |
| 155 Mayhew Cir. | 15600 | $104,417 | 1979 |
| 165 Mayhew Cir. | 20300 | $104,417 | 1979 |
| 170 Mayhew Cir. | 14100 | $104,417 | 1965 |



restrictions but without the value of the TDRs, is now worth $12,946—the average sales price of the seven restricted lots used as comparables by assessor Johnson[6]—then the TRPA restrictions have reduced the value of Suitum's land by 87.6%.

Although an 87.6% diminution in value is substantial, the *Lucas* Court specifically acknowledged that a landowner burdened by an even larger diminution—95%—would not be able to claim the benefit of the Court's "deprivation of all economically beneficial use" category. *See Lucas*, 505 U.S. at 1019 n.8. That landowner's case, the Court held, would be properly considered under the test formulated in *Penn Central*, which treats the economic impact of the challenged regulation as only one of a number of relevant factors. *Lucas*, 505 U.S. at 1019-20 n.8. According to the *Lucas* Court, only "the landowner who suffer[ed] a complete elimination of value"—not 95%, but 100%—would be entitled to just compensation under its per se category. *Id.* at 1019 n.8. Like the owner subject to the more substantial 95% diminution, Suitum should "not be able to claim the benefit of [*Lucas*'s] categorical formulation."[7] *Id.*; *cf. Hadacheck v. Sebas-*

[6] *See* Exhibit A to Supplemental Affidavit of Stephen R. Johnson in Support of Motion for Summary Judgment. Although the Supplemental Affidavit is reprinted at J.A. 139, Exhibit A is available only in the district court record. The seven sales reported by Johnson were for $13,000; $16,000; $10,000; $16,750; $18,750; $7,125; and $9,000.

[7] Under *Lucas*, once a landowner has shown a total loss in value, the government may still avoid a finding of constitutional infirmity if it can show that its regulation does no more than make explicit previously existing common law principles of nuisance and property. *See Lucas*, 505 U.S. at 1029-1031. It is to this secondary

*tian*, 239 U.S. 394, 405 (1915) (upholding an ordinance which reduced a parcel of land's value from $800,000 to $60,000, a 92.5% diminution).

To be sure, it may be sound constitutional policy to exclude certain types or sources of value from consideration when asking whether a regulation has rendered a parcel of land "valueless" within the meaning of *Lucas*. For example, speculators may be willing to purchase land at a deep discount to gamble on the possibility that the legislature will repeal the regulation that has rendered the land valueless. This Court might choose to exclude such "political speculation value" from the threshold *Lucas* analysis on the ground that the potential of repeal should not be a factor in considering whether regulation currently in force works an unconstitutional taking. *But see Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1566-67 (Fed. Cir. 1994) (speculative market cannot be disregarded in establishing fair market value in takings case), *cert. denied*, 115 S.Ct. 898 (1995).

This Court might also choose to exclude value arising from illegal activities. For example, evidence that marijuana cultivators were willing to pay handsome prices for certain parcels of land subject to severe environmental regulation might not be admissible even if the regulation generally allowed horticultural uses, on the ground that consideration of such "illegal use value" violated public policy. Suitum, however, has not alleged that the value of her land as regulated is attributable to some source that

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"nuisance exception" inquiry that the issue whether a regulation prohibits "occupiable improvements," Pet. Br. at 31, may be relevant, since the regulation must be compared to common law principles that may have preserved some opportunity for the landowner to "erec[t] habitable or productive improvements on [his] land." *Lucas*, 505 U.S. at 1031. Suitum's assertion that regulation prohibiting "occupiable improvements" runs afoul of *Lucas* confuses this secondary inquiry with the initial, threshold inquiry, which is limited to the issue whether the regulation has eliminated all market value of the landowner's land.



should be excluded, and there is no evidence in the record that the value stems from such a source.[8] Thus, Suitum's case falls short of the requirements for inclusion in the *Lucas* per se takings category.

### B. TRPA's Regulations Have Not Rendered Suitum's Land Useless

Suitum argues vigorously that this Court's formulation in *Lucas* focuses not on the value of property, but on its use. Pet. Br. 31-32. Suitum's primary goal in pressing this distinction is to construct a foundation for her argument that TDRs do not constitute a "use" of property relevant to the *Lucas* analysis, an argument addressed in Part II of this brief. But even if this argument were properly before this Court, Suitum would first need to convince this Court that, absent the TDRs, TRPA's restrictions on her land would work a per se taking under *Lucas*, since she does not challenge this Court's holding in *Penn Central*, 438 U.S. at 137, that the value of TDRs is relevant to takings analysis generally. Here, however, the distinction between "use" and "value" does not aid Suitum, because TRPA's restrictions do not render her land "useless" any more than they render it "valueless."

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[8] There is evidence in the record that, in addition to the private market for Suitum's land, there was and still may be a public market: the State of Nevada offered Suitum $35,000 for her land, an offer which she rejected. *See* Suppl. Johnson Aff., J.A. 141. Some courts have questioned whether such a public market should be considered in takings analysis. *See, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.2d 1422, 1432 (9th Cir. 1996) (holding that a sale of land to the government for $800,000 more than the takings claimant paid for it did not preclude a jury finding that government restrictions on the land worked a taking); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316, 1327 (D. Nev. 1992) (holding that a takings claimant's sale of land to the government did not entitle the government to summary judgment on her regulatory takings claim). This case, however, does not raise that issue, since uncontroverted evidence suggests that there is a substantial private market for Suitum's land aside from any public market.

The district court understood Suitum to be seeking damages "because she [was] not allowed to build a residence on [her] property," not because she was unable to make any use of the property whatsoever. 1994 Order, J.A. 150. This understanding comported with the only admitted evidence on the issue, which indicated that TRPA regulations would allow a variety of uses on Suitum's land.[9] Susan E. Scholley, a TRPA attorney, testified that "a structure or activity, that allows 75 percent or more of the precipitation to reach the ground and permits the growth of vegetation, could be placed on the property." Scholley Aff. II, J.A. 149. Because Scholley was responding to Suitum's specific assertion that no adjoining homeowner could possibly be interested in purchasing her land, Scholley listed a number of items qualifying under this standard that would typically be useful to adjoining homeowners: "chaise lounges and patio table[s], jungle gyms, swing sets, pet enclosures, picnic table[s], volleyball or badminton sets, and garden trellises." *Id.* In addition, Scholley testified that TRPA regulations "permit[ted] gardening and landscaping" of Suitum's land, "subject to standard TRPA limitations," and also permitted fencing of the land. *Id.*

Suitum represents to this Court that "TRPA's regulations allow Mrs. Suitum to make no more use of her land than if a company of troops had permanently encamped there." Pet. Br. 33. Scholley's uncontroverted testimony, however, reveals this vivid analogy to be an unsupported flight of fancy. Not only does Suitum retain her right to exclude others, military or civilian, from her land; she also may garden, landscape, fence, and place qualifying structures on it, uses precluded by her figmental barracks.

[9] Suitum wrongly asserts that "there is disagreement in the record below concerning [her] remaining ability" to use her land. Pet. Br. at 32. The affidavit that she relies on to create the disagreement was excluded by the district court because the affiant did not demonstrate "any knowledge, skill, experience, training or education which would qualify him to testify as an expert." Pet. App. C-2 n.1. There is no disagreement in the admitted evidence.



Suitum has cited no case that has applied the *Lucas* Court's formula of "economically beneficial use" to find a per se taking even though land retains a demonstrable market value, perhaps because no case that has even arguably done so would help her.[10] The only admitted evidence on the issue suggested that the market for parcels of land such as Suitum's was generated by neighbors interested in using them for normal residential activities such as gardening, recreation, and the pursuit of various hobbies. Suppl. Johnson Aff., J.A. 140; Scholley Aff. II, J.A. 144, 149. Because normal residential uses are precisely the kinds of uses that would make Suitum's land valuable even in the absence of regulation, there is no reason why such uses should be excluded from consideration under *Lucas*.[11]

[10] *Amicus* Tahoe-Sierra Preservation Council, Inc. (Br. at 29 n.13) suggests that this Court look to *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996). In *Del Monte*, the court, in the course of upholding a jury's finding that city regulation of plaintiff's land worked a taking, suggested that evidence that someone might offer plaintiff some amount of money for the land did not necessarily preclude a finding that the regulation worked a per se taking under *Lucas*. *Id.* at 1432-33. The *Del Monte* court relied heavily on *Formanek v. United States*, 26 Cl. Ct. 332 (1992), a pre-*Lucas* case which held that offers from two conservation groups to purchase land for the purpose of maintaining it in its natural state did not establish that the land had a sufficient market value to foreclose a takings claim. *Id.* at 340. Whatever the merits of the *Formanek* decision, however, it has no application to Suitum's case, since there is no record evidence indicating that the market for Suitum's land is created by conservation groups wishing to preserve it in its natural state.

[11] TRPA also presented testimony that neighbors might be interested in acquiring adjacent land to control the uses and activities that might occur on it, Suppl. Johnson Aff., J.A. 140, and that a neighbor would be able to fence the property to provide privacy, using it as a buffer. Scholley Aff. II, J.A. 149. Suitum has not suggested any reason that use to provide privacy or as a buffer should be excluded from the *Lucas* analysis. Much of the residential land in this country is so used. Private owners value land as a buffer for many of the same reasons that motivate local

### C. *Lucas* Cannot Reasonably Be Expanded To Create An Absolute Right To Place Impermeable Cover On Land

Suitum places great emphasis on the district court's remark that it "understood that plaintiff may not develop or build on the parcel of land she owns." 1993 Order, J.A. 88; *see* Pet. Br. 4, 13, 31. This remark, however, is no more than the district court's acknowledgement that, because Suitum's land lies within a stream environment zone, she cannot seal off her land with impervious cover that would prevent water from draining through the soil.[12] 1993 Order, J.A. 87 (noting that TRPA's 1987 Regional Plan allowed virtually "no new land coverage" within stream environment zones); Scholley Aff. II, J.A. 145 (stating that "land coverage" means "cover[age] by impervious surface, such as [a] residence, driveway and decks"). Thus, the district court's remark would bear on Suitum's per se takings claim only if *Lucas* were stretched to create an absolute right to place impermeable cover on land. Such an extension, however, is inconsistent with *Lucas*'s rationale and has no other historical or functional basis.

The central insight of *Lucas* is that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S.

governments to enact setback ordinances like the one approved by this Court seventy years ago in *Gorieb v. Fox*, 274 U.S. 603, 609 (1927): it "afford[s] room for lawns and trees, keep[s] the dwellings farther from the dust, noise, and fumes of the street, add[s] to the attractiveness and comfort of a residential district, and . . . reduce[s] the fire hazard."

[12] Indeed, the district court explained that a score of zero under TRPA's Individual Parcel Evaluation System amounted to "a prohibition of new land coverage"; in a footnote to that very sentence, the court referred to the zero score's effect as prohibiting Suitum "from building," signaling that it was using "building" as a colloquial abridgment of "new land coverage." 1993 Order, J.A. 87 & n.3.



at 1017. A right to place impermeable cover on land plainly has no place in this equation. Of the approximately 2.1 billion acres of land in the United States, *see* Rutherford H. Platt, *Land Use and Society* 6 (1996), the vast majority is devoted to uses that do not involve impermeable cover. As of 1992, for example, 979 million acres of land was devoted to farming, and 737 million acres was forest land.[13] *See* U.S. Bureau of the Census, *Statistical Abstract of the United States: 1996*, 664, 685 (1996). Yet those uses are enormously productive and economically beneficial. In 1992, for example, the gross farm product was 80.6 billion dollars; the total value of timber cut was 938 million dollars. *Id.* at 666, 685. Thus, economic wipeout and its practical equivalence to physical appropriation—the justification for the *Lucas* category as it now stands—cannot support an extension of the category to encompass all bans on impermeable cover.[14]

Suitum has failed to identify any other viable justification for such an extension. Because the vast majority of American land is not and never has been covered by impermeable surfaces, there is no support in custom or historical tradition for recognizing a per se right to impermeable cover. Nor can such a right be derived from

[13] Of course, a miniscule portion of these lands is covered by impermeable surface, supporting structures such as barns and silos. The land that actually produces crops and timber and provides forage for livestock, however, is not so covered, and prohibiting impermeable cover on that land would not affect its productivity.

[14] The value of Suitum's property appears to be attributable not to potential agricultural uses, which the property's size and location might render infeasible even in the absence of regulatory constraints, but to normal residential uses. *See supra* p. 14. When Suitum contends that *Lucas* should be extended to protect a right to "develop," however, she is proposing a category that would apply equally to all land in the United States. If application of that category to farms and forests—a majority of that land—cannot be squared with *Lucas*'s central rationale, then the proposal lacks merit.

private property's function of providing "a bulwark of personal autonomy against . . . the state." Pet. Br. 22. In fact, in traditional American thought, the idea that ownership of land promotes personal autonomy is specifically connected with agricultural use of land. As James Madison put it:

> The class of citizens who provide at once their own food and their own raiment, may be viewed as the most truly independent and happy. They are more; they are the best basis of public liberty and the strongest bulwark of public safety.

James Madison, *Republican Distribution of Citizens*, in The Mind of the Founder: Sources of the Political Thought of James Madison 185 (Marvin Meyers ed., rev. ed. 1981). A radical fidelity to this ideal of agrarian independence would conceivably *require* public restrictions on impermeable cover, to preserve tillable land, rather than preclude them.

### D. *Lucas* Cannot Reasonably Be Expanded To Create An Absolute Right To Build A House On "Residential Property"

Suitum's last effort to tie her case to *Lucas* involves the argument that *Lucas* creates an absolute right to build a home on "residential property." Pet. Br. 32. A closer look at the ambiguous term "residential property," however, reveals that it is not susceptible of a definition suitable to serve as the basis for a per se takings category. Perhaps, by "residential property," Suitum means land on which, but for the challenged regulation, residential use would be legally permitted, or on which residential use had been legally permitted before enactment of the regulation. Under this definition, however, the proposed per se takings category would be absurdly large. Governments could never prohibit homebuilding on land on which residential use was once allowed, and even a ban on residential use that had existed time out of mind would be vulnerable to the argument that, absent that ban, homebuilding would be legal.



Alternatively, by "residential property" Suitum may mean land adjacent to, or surrounded by, other land that is in fact used for residential purposes. Yet a per se rule making compensable any prohibition of residential use on land surrounded by other residences does not seem worthy of serious consideration. Of course, the fact that many of Suitum's neighbors have houses on their parcels is relevant to ordinary takings analysis under *Penn Central*. Absent further explanation, such disparity may raise equal protection concerns. *Cf. Lucas*, 505 U.S. at 1035-36 (Kennedy, J., concurring in the judgment) (the timing of a ban on construction enacted after "the property had been zoned for individual lot development and most other parcels had been improved . . . must be measured in the balance"). Further explanation, however, may relieve such concerns. In Suitum's case, because the district court granted summary judgment on the issue of ripeness, the relevant facts about the neighbors' existing residential uses were never fully developed. Information available from public records, however, suggests that Suitum's claim of unequal treatment may be considerably weaker than she intimates it is.

On February 10, 1972, more than six months before Suitum bought her land,[15] TRPA adopted Ordinance No. 4, which contained a comprehensive set of land-use regulations for the Lake Tahoe Basin. Ordinance No. 4 included a Land Capability Map that classified the general area in which Suitum's land was located as "Land Capability District No. 6," the source of Suitum's claim that her land "was classified as suitable for residential construction." Pet. Br. 2 n.1. The Land Capability Map, however, explicitly noted that it was to be used only as a

[15] Suitum purchased her land on September 7, 1972. *See* Deposition of Bernadine Suitum, at 14 (June 23, 1993).

rough guide. In particular, it noted that because areas such as Suitum's "locally contain riparian zones along stream courses that meet the criteria for class 1b [stream environment zone], although shown on the map as class 7 [,] . . . final land capability classification for individual parcels should be based on detailed site evaluation." TRPA Ordinance No. 4, Land Capability Map (excerpted in Appendix A to this brief).

Although Ordinance No. 4 placed stringent limitations on parcels classified as class 1b, as Suitum's ultimately was, it also contained a "grandfather" provision that was obviously designed to protect the reasonable investment-backed expectations of subdivision lot owners such as Suitum. The grandfather provision, in force until 1980,[16] allowed owners of lots in subdivisions approved before 1972 to construct single-family houses even though the lots were otherwise subject to more restrictive regulation. *See* TRPA Ordinance No. 4, §§ 9.11, 9.14 (excerpted in Appendix B to this brief). Over half of Suitum's neighbors on Mayhew Circle for whom tax records are easily available, including both of her immediate neighbors, built their houses during the eight-year period the grandfather provision was in force. *See supra* n.5. Thus, Suitum and her neighbors may have had an equal, reasonable opportunity to fulfill their investment-backed expectations. Further factual development may increase or diminish the importance of the Land Capability Map proviso and the grandfather provision; on the record before this Court, nothing more than uninformed speculation is possible.

In sum, given the district court's findings and the record in this case, TRPA's restrictions on Suitum's land do not amount to a per se taking under *Lucas* based on any

[16] In December 1980, Nevada and California, with Congressional approval, extensively amended the Compact that had created TRPA, leading to the passage of ordinances that superseded Ordinance No. 4. *See, e.g., Kelly v. Tahoe Regional Planning Agency*, 855 P.2d at 1030 n.4.



reasonable interpretation or extension of that case. The expansion of the per se takings category that Suitum seeks—to encompass any ban on impermeable cover, or any ban on homebuilding on "residential property"—would tear the category from its original rationale and leave it bereft of any historical or functional justification.

## II. THE QUESTION WHETHER TRANSFERABLE DEVELOPMENT RIGHTS COULD EVER SAVE LAND-USE REGULATION THAT WOULD OTHERWISE RUN AFOUL OF *LUCAS* SHOULD NOT BE RESOLVED AS AN ABSTRACT, HYPOTHETICAL MATTER

The nub of Suitum's principal argument in this Court is that her TDRs do not constitute a "use" of her pre-existing property rights, and therefore should be excluded from consideration when determining whether TRPA's regulations have left her with any "economically beneficial use" of her property. Pet. Br. 12-15, 19, 22, 33-34. This Court has already considered and rejected such an argument in a fully developed factual context. The Court held in *Penn Central* that a prohibition on building above Grand Central Terminal did not "den[y] *all* use of [appellants'] pre-existing air rights" because the rights were "made transferable to at least eight parcels in the vicinity of the Terminal." 438 U.S. at 137.

Because no amount of tugging and twisting will wring a *Lucas* claim from the record in the present case, Suitum's principal argument amounts to a request that this Court reconsider its holding in *Penn Central*, not in light of another concrete factual context, but as an abstract, hypothetical issue. Any pronouncement on this issue will affect not only the parties to this case, but the scores of state and local governments nationwide that have created transferable development rights, and the thousands of private parties that sell, buy, and hold those rights. Yet, at this point, the issue "remain[s] unfocused because [it is] not pressed before the Court with that clear

concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (Frankfurter, J.). Under such circumstances, this Court can and should resolve the issue of ripeness presented in this case without accepting Suitum's invitation to dispense with the "clear concreteness" that has historically aided its vision.

### A. The Court Should Not Reconsider In This Case Its Holding In *Penn Central* That TDRs Constitute A "Use" Of Property

In *Penn Central*, the owners and a lessee of Grand Central Terminal claimed that a New York City landmark law worked a taking because it "deprived them of any gainful use of their 'air rights' above the Terminal." 438 U.S. at 130. The *Penn Central* Court rejected their claim:

> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.

*Id.* at 137. Although Suitum avoids any mention of *Penn Central*, her principal argument is a direct challenge to this portion of its holding. The only "use" that counts for purposes of the "economically beneficial use" test, argues Suitum, is physical activity on her land; other uses of her development rights, such as transfer to other parcels in the vicinity, must be ignored. Suitum thus asks this Court both to reject a "market value" interpretation of *Lucas* in favor of a "use" interpretation, and to reject a modern conception of "using" a bundle of rights in



favor of a physicalist conception of "using" land itself, all without a set of facts that would flesh out these abstract choices.

One example may help demonstrate why the lack of a concrete context to spur reflection on these choices may endanger the orderly development of substantive takings law. One might ordinarily assume that the rejection of a "market value" interpretation of *Lucas* in favor of a "physical use" interpretation would necessarily increase the number of cases deemed to be *Lucas* per se takings, since it would sweep in those cases in which land without remaining physical use retained a speculative market value, or a market value attributable to TDRs. This presumption, however, ignores what might be made quite obvious in a particular case: that all land ownership involves duties as well as rights, and that the economic burden of the duties may offset or outweigh the economic value of the rights.

For example, a zoning ordinance might permit the construction and operation of a factory on a particular parcel of land—an undeniably valuable physical use of the land. At the same time, however, governmentally-imposed liability for remediating soil contamination on that parcel might cause the parcel to have a market value of zero, or even a negative market value. *See, e.g., In re Dant & Russell, Inc.*, 853 F.2d 700, 702-703 (9th Cir. 1988) ("With [soil contamination] cleanup costs estimated at $10-30 million, the land has a substantial negative value no matter who ultimately takes possession."). In such a case, the zoning ordinance might work a *Lucas* per se taking under a market value interpretation, but not under a physical use interpretation. At least one lower court appears to have assumed that such offsetting burdens should be taken into account in a regulatory takings case. *See Bowles v. United States*, 31 Cl. Ct. 37, 48 (1994) ("Plaintiff's expert real estate appraiser . . . concluded . . . that Lot 29 actually became a liability after the

government action because [the lot's owner] would still be liable for annual property tax assessments.").

The case for taking offsetting burdens into account may be particularly strong when the duties are imposed as part of the regulatory scheme that has significantly curtailed the landowner's rights. *See, e.g., Penn Central,* 438 U.S. at 111 (noting that the New York City landmarks law "imposes a duty upon the owner to keep the exterior features of [a landmarked building] 'in good repair' "). Because Suitum's property retains both value and use, however, this case gives this Court no reason to consider these wider implications of adopting Suitum's proffered "physical use" interpretation. Potential traps such as this one should caution the Court against elaborating the *Lucas* per se category here.

One passage in Suitum's brief suggests that, even if the Court rejects the "physical use" interpretation in favor of a "bundle of rights use" interpretation, *no* use of her TDRs constitutes use of her previously existing development rights, since the TDRs do not perfectly correspond to those pre-existing rights. *See* Pet. Br. 20. Yet the *Penn Central* Court described the New York City TDR program as involving a transfer of pre-existing rights even though that program was arguably "far from ideal." *Penn Central,* 438 U.S. at 137 (citation omitted). In truth, the preservation of a landowner's pre-existing rights by means of TDRs is a matter of degree. No TDRs, Suitum's included, fulfill perfectly what may have been the pre-regulation expectations—reasonable or unreasonable—of landowners. Yet neither are TDRs in general, nor Suitum's in particular, merely unrelated compensation for rights that landowners have wholly lost.[17]

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[17] The phenomenon of partial preservation of ownership rights is a familiar one, encountered every time a legislature modifies a jurisdiction's system of estates in land. For example, when a legislature provides that tenancies at will cannot be terminated without advance notice, it in effect converts those tenancies to



Because TDRs enable development to occur within a particular area—in this case, the Lake Tahoe Basin—their value, like the value of a landowner's pre-regulation rights but unlike the value of unrelated compensation, will rise and fall with the fortunes of the area. In that sense, Suitum's TDRs preserve her investment in the area. Neither does the distinction between TDRs and unrelated compensation become irrelevant because Suitum may have held her land, not merely as an investment, but also as a potential site for her own retirement home. The TDRs, unlike unrelated compensation, may directly aid her in her quest to build a retirement home in Lake Tahoe Basin, by enabling her to build a home on a Basin site that otherwise could not be developed to the same degree or at the same time. Whether this distinction should make a difference in a particular case is a question that this Court should not decide in the abstract—the only form in which it is presented in this case.

### B. Any Abstract Pronouncement Will Likely Lead To Unnecessary Litigation About A Wide Variety Of Existing TDR Programs

Since this Court's decision in *Penn Central,* a growing number of state and local governments have become in-

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periodic tenancies. *See Restatement (Second) of Property,* Landlord & Tenant § 1.6 Statutory Note, at 43-44 (1977) (listing statutes in 28 States which modify the common law rule that no period of advance notice is needed to terminate a tenancy at will).

It is hyperbolic, however, to say that the legislature has wholly deprived landlords of the reversionary interests corresponding to their tenants' tenancies at will, and has compensated them for that deprivation by granting them completely different reversionary interests that correspond to periodic tenancies. Rather, one would ordinarily describe the legislation as having modified one aspect of the landlord's interest while preserving others.

TDR legislation likewise partially modifies and partially preserves an owner's rights, although the degree of change may be greater. The flawed argument that TDRs are equivalent to cash compensation for lost rights is made most explicitly in the *amicus* brief of the Institute for Justice, at 9-10.

terested in the transfer of development rights as a means of effectuating a variety of important regulatory goals while partially preserving opportunities that landowners would otherwise lose. Initiation of this process involves the recognition of a new type of property right, generically known as a "transferable development right"—a right to erect a structure that occupies a certain surface area or amount of airspace, or to erect a structure with a particular use or at a particular time, which may be used on any one of a number of parcels of land. Recognition of such rights follows a venerable tradition in Anglo-American law of devising new property interests to meet social needs. One of the reasons that TDRs have flourished in the United States is that they can be easily understood in a legal culture that is already familiar with constitutional protection of such specialized property interests as right-of-way easements, *see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987); flight easements, *see United States v. Causby*, 328 U.S. 256, 265 (1946); support rights, *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); rights to be free of annoyances produced by neighbors, *see Richards v. Washington Terminal Co.*, 233 U.S. 546, 553-55 (1914); materialmen's liens, *see Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960); real estate liens, *see Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935); contractual agreements, *see Lynch v. United States*, 292 U.S. 571, 579 (1934), and trade secrets, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984).

Suitum's attack on TDRs as "arbitrarily created, intangible entitlements," Pet. Br. 15, is perplexing. It is her claim, after all, which as a *regulatory* takings claim wholly depends upon a conception of property as a "bundle of rights" rather than a physical thing—a conception that she champions elsewhere in her brief. *Id.* at 19. And it is that very conception that has led this Court both to acknowledge a wide variety of "intangible entitlements" as constitutionally protected property, and to recognize



that all such entitlements are "arbitrarily created" in the sense that they "are not created by the Constitution . . . [but] are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see Monsanto*, 467 U.S. at 1001-04 (holding that a trade secret recognized as property under Missouri law is protected by the Fifth Amendment Takings Clause). Thus, Suitum's general assault on TDRs is not only misguided, but inconsistent with an essential premise of her own claim.

Although the basic idea of TDRs is simple, there are a multitude of variations among TDR programs. Governments use TDRs to effectuate a variety of goals, such as historic preservation, environmental protection, fostering of agricultural activity, and preservation of unique natural features. *See* Rick Pruetz, *Putting Transfer of Development Rights to Work in California* 41 (1993). These diverse purposes lead to use of TDRs in settings ranging from downtown commercial districts, to suburban residential neighborhoods, to rural farms, forests, and wetlands.

In Washington, D.C., for example, TDRs have been used in the heart of the business district since the 1980s to save architectural and cultural landmarks such as the Warner Theatre and to restore historic churches such as Calvary Baptist Church and St. Peter's Roman Catholic Church. *See* D.C. Mun. Regs., tit. 11, § 1709. In San Francisco, TDRs have been used since the 1960s to preserve 250 noteworthy downtown structures. *See* San Francisco, Ca., Planning Code § 128; Pruetz, *Putting Transfer of Development Rights to Work* at 66-67.

In Montgomery County, Maryland, a TDR program in place for two decades has preserved 89,000 acres of land—one-third of the county—as farmland, by giving farmers an economic incentive to continue farming while channeling growth elsewhere in the county. *See* Maryland-

National Capital Park & Planning Commission, *Plowing New Ground* (rev. ed. 1990); James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 Yale J. on Reg. 369, 382 n. 36 (1989). In New Jersey, TDRs have been instrumental in preserving the Pinelands, a unique, fragile forest ecosystem, in the face of intensive growth in neighboring areas of the State. *See* Terrence D. Moore, *New Jersey's Special Place: The Pinelands National Preserve*, New Jersey Lawyer, April 1996, at 28. In Florida, TDRs form an essential part of a program that has saved tens of thousands of acres of the East Everglades. *See* Metropolitan Dade County, Fla., Code ch. 33B, art. II, div. 3.

TDR programs vary, not only in purpose and setting, but in their substantive details. While Dade County permits TDRs to be used throughout the County, *see id.* at § 33B-45, and Suitum's rights may be transferred within a 14,106 acre area, *see* Affidavit of Lyn Barnett in Support of Motion for Summary Judgment, J.A. 96, the TDRs at issue in *Penn Central* could be used only on adjacent or nearly adjacent parcels. *See Penn Central*, 438 U.S. at 114. While the *Penn Central* TDRs were apparently rights to construct additional floor area, *see id.*, Suitum's TDRs concern land coverage, residential units, and timing of development, *see supra* at 2-3, and TDRs in Cupertino, California are transferable rights to operate vehicles in the downtown business district. *See* Pruetz, *Putting Transfer of Development Rights to Work* at 75. Methods of calculating the TDRs credited to particular owners also differ in these cases and others. *Compare Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 256 (N.J. 1991) *with West Montgomery Cty. Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 522 A.2d 1328, 1331 (Md. 1987).

The existence of a large number of widely varying, successful TDR programs provides yet another reason why this Court should decline Suitum's invitation to issue



an abstract proclamation about the place of TDRs in a *Lucas* inquiry. The lack of a concrete factual context in this case not only impedes reflection about the consequences of a contemplated holding, it also deprives potential litigants and lower courts of the most important source of guidance in interpreting this Court's general declarations. Without the implicit limitations provided by a particular factual setting, a general remark will likely cause unnecessary litigation about widely varying TDR programs and regulatory settings. For this reason and the many others given above, this Court can and should decide the ripeness issue in this case without addressing the arguments belatedly raised by Suitum about the application of *Lucas* to TDR programs.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 9, 1997

## APPENDIX A

Excerpt from TRPA Land Capability Map
(adopted as part of TRPA Ordinance No. 4 (1972))

### USE OF THE MAP

This map can be used to judge the risk of land damage and to assign use activities and intensities within hydrologic and topographic limitations. This study does not suggest that development should occur on the locations shown. It merely reveals which lands meet the criteria that have been selected. In addition, because of the scale of the map and the maps from which it was compiled, land capability levels within individual map units may not be uniform. For example, flat valley floors locally contain riparian zones along stream courses that meet the criteria for class 1b, although shown on the map as class 7. It is therefore necessary that the final land capability classification for individual parcels should be based on detailed site evaluation and more detailed application of the land capability criteria.

## APPENDIX B

Excerpt from
TRPA Ordinance No. 4 (1972)

*Section 9.00 Non-Conforming Uses, Structures and Alterations*

9.11 *Existing Uses and Structures*

Uses of land and structures that do not conform to the regulations established by this ordinance and which lawfully existed on February 10, 1972, or which are to be created in connection with structures for which a valid building permit was issued on or before February 10, 1972 and upon which construction has commenced as allowed by such permit prior to February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government and where necessary by the Agency within five (5) years prior to February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government more than five (5) years prior to February 10, 1972 and there has been construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction prior to February 10, 1972 are nonconforming uses and structures and may be continued, transferred or sold, provided, however, in the case of a use to be created it shall occupy no greater area than planned at the time such building permit was issued or subdivision approved. If any such use ceases for a period of one (1) year, subsequent use of such land shall be in conformity with the regulations contained in this ordinance.



9.12 *Repair of Non-Conforming Uses and Structures*

Ordinary maintenance and repairs may be made to any non-conforming building or structure, or any use, provided, however that no structural alterations are made and that the cost of such work does not exceed 20% of the replacement value of such building or structure in any one year.

9.13 *Reconstruction of Non-Conforming Structures*

A non-conforming building or structure, or any building or structure devoted to a non-conforming use, damaged by fire or calamity may not be reconstructed other than in accordance with the provisions of this ordinance unless the cost of reconstruction does not exceed 50% of the replacement cost of such building or structure prior to the damage having occurred. Where reconstruction is permissible, the building[] as reconstructed shall have no greater floor area than it had prior to being damaged.

9.14 *Single Family Houses on Pre-Existing Lots and Parcels*

One single family house may be constructed on any existing legal lot or parcel of record as of February 10, 1972 that is located in any district except Tourist Commercial or Commercial, provided, however, that this section shall not apply to lots in residential subdivisions where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972 and there has been no construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972.

Supreme Court, U.S.
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No. 96-243

IN THE

# Supreme Court of the United States

**October Term, 1996**

BERNADINE SUITUM,

*Petitioner,*

*-v-*

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

## INTEREST OF AMICUS

Amicus the State of New York is concerned about the potential impact of the Court's ruling in this case on several transferable development rights programs throughout the State. An overly-broad ruling, along the lines suggested by the petitioner, could adversely affect New York's programs. Given the differences among the numerous transferable development rights programs throughout the country, New York State respectfully urges the Court to tailor any holding regarding transferable development rights to the program before it.

The State has enacted a number of statutes that provide for the transfer of economically beneficial uses from one parcel of property to another. For example, the Legislature amended the Town Law to provide each municipality throughout the State with the authority to establish a Transferable Development Rights program. *See* Town Law § 261-a. Also, the Adirondack Park Agency Act permits adjacent parcels to aggregate their development rights on a single parcel. *See* Executive Law § 809(10)(c). Moreover, New York City's historic preservation regulations include a transferable development rights program.

In addition to these varied programs, the New York State Legislature recently enacted a comprehensive land use statute for the Central Long Island Pine Barrens (the "Act") that provided for the development and implementation of a voluntary transferable development rights program. *See* Environmental Conservation Law ("ECL") Article 57 (McKinney's 1996 Supp.). The Act, which we describe in some detail, has two central goals: (1) to protect the quality of Long Island's drinking water; and (2) to preserve the unique ecosystem of the Long Island Central Pine Barrens for present and future generations. ECL § 57-0105.

A. The Long Island Aquifer and the Central Pine Barrens Ecosystem

There can be no dispute about the critical importance of the Long Island aquifer and the fire-prone Central Pine Barrens ecosystem. The United States Environmental Protection Agency has determined that Long Island's sole-source aquifer provides the "sole or principal drinking water supply" for the area's 2.5 million citizens and "is vulnerable to contamination." *See* 43 Fed. Reg. 26611-12 (June 21, 1978). Given that the Long Island aquifer is the principal source of drinking water for Nassau and



Suffolk Counties, the EPA determined that the contamination of the aquifer "would create a significant hazard to public health." *Id.* at 26612. The New York State Legislature has long sought to protect this vital resource. For example, in 1987, the Legislature enacted the Sole Source Aquifer Protection Law, ECL Article 55, to assist in comprehensive planning to protect the water quality of the Long Island aquifer. ECL § 55-0101.

Four years ago, in *Long Island Pine Barrens Society, Inc., v. Planning Bd. of the Town of Brookhaven*, 80 N.Y.2d 500, 591 N.Y.S.2d 982 (1992), the New York Court of Appeals summarized the fragility and critical environmental attributes of the Central Pine Barrens. 80 N.Y.2d at 510-11, 591 N.Y.S.2d at 985-86. The Court stated that "[t]he Pine Barrens' singular geological and meteorological history, as well as its highly unusual soil, vegetation and water levels, make it particularly hospitable to a wide variety of life forms whose survival could well be threatened by development." 80 N.Y.2d at 509, 591 N.Y.S.2d at 984-85. The Court also recognized that the "Pine Barrens is an indispensable component of the aquifer system that is the sole natural source of drinking water for over two and a half million inhabitants of Long Island," 80 N.Y.2d at 508, 591 N.Y.S.2d at 984, and is:

> especially vulnerable to the risk of pollution, since its permeable soil is not readily capable of filtering or degrading contaminants. As is indicated by at least one study, once the deep recharge system in this area becomes contaminated, it would take centuries to flush it sufficiently to return it to clean groundwater quality. Thus, as a practical matter, contamination would be irreversible. . . . It is thus apparent that the protection of the Pine Barrens region from sources of pollution is vital to the health of Long Island's human population.

80 N.Y.2d at 509, 591 N.Y.S.2d at 984-85.

While holding that a cumulative environmental impact statement covering 224 development projects was not mandated by the State Environmental Quality Review Act ("SEQRA") regulations, 80 N.Y.2d at 517, 591 N.Y.S.2d at 990, the Court stated that "an exhaustive and thorough approach to evaluating projects affecting [the Central Pine Barrens] is unquestionably desirable and, indeed, may well be essential to its preservation. . . ." 80 N.Y.2d at 515, 591 N.Y.S.2d at 988. The Court recognized "the need for centralized planning by a single regional agency" and called for a legislative resolution to the problems caused by piecemeal development stating that "the solution must be devised by the Legislature, which is responsible for crafting sensible deadlines and mandating prompt action by the designated planning bodies to address this matter of urgent public concern." 80 N.Y.2d at 516, 518, 519 N.Y.S.2d at 989, 990.

B. The Long Island Pine Barrens Protection Act

Soon thereafter, the New York State Legislature enacted L. 1993, c. 262, 263. *See also* L. 1996, c. 145. The Legislature declared that the protection of Suffolk County's Pine Barrens, especially the area known as the Central Pine Barrens, is of "critical" importance to the State because it lies over "the largest source of pure groundwater in New York" and "contains one of the greatest concentrations and diversities of endangered, threatened and special concern species of plants and animals to be found in the state," ECL § 57-0105, and that the area's "hydrological and ecological integrity is endangered," ECL § 57-0119(1). The Act divided the Central Pine Barrens into two areas known as the Core Preservation Area and the Compatible Growth Area, ECL §§ 57-0105, 57-0107 (10),(11), required the



preparation of a state-supported Central Pine Barrens Comprehensive Land Use Plan (the "Plan"), ECL § 57-0105, and established the Central Pine Barrens Joint Policy and Planning Commission "to plan, manage and oversee land use" within the Pine Barrens. ECL § 57-0119 (1), (2), (6). In accordance with the Act, the Commission prepared the Plan which subsequently was adopted by the involved towns and Suffolk County. Governor Pataki signed the Plan on June 28, 1995.

The Act and the Plan permit agricultural, recreational, and some residential uses within the Core Preservation Area. ECL § 57-0121(3); L. 1996, c. 145. Also, landowners who wish to develop property within the Core Preservation Area may apply for a development permit for any land use, and the Commission may permit such use pursuant to the Act. ECL §§ 57-0123(3); 57-0121(10). The Act specifically provides that, like other administrative actions, the Commission's permit determinations are reviewable in state court proceedings, and should the court find a taking, the Commission must either permit the requested development or pay for the acquisition of the property interest in question. ECL § 57-0135; CPLR Article 78.

C. The Long Island Pine Barrens Credit Program

In addition to the uses discussed above, and because the Plan's land use regulations may limit the value of some lands, a new use right under the Pine Barrens Credit Program was established for all privately owned property in the Core Preservation Area. Specifically, the Pine Barrens Credit Program vests in Core Preservation Area real property the right to transfer development potential or "development rights" to other property designated for more intense development upon receipt of Pine Barrens Credit. ECL § 57-0105; *see also* ECL § 57-0121(6)(m); ECL § 57-0119(6)(j), (p). Pursuant to the Act, the Plan identified

"Sending Districts" within the Core Preservation and Compatible Growth Areas, and "Receiving Districts" outside of the Core Preservation Area. ECL § 57-0121(6)(f). The Act also directed the Commission to establish a system generally referred to as the "Development Rights Bank"—a system whereby values are set and standards established with respect to the purchase, sale, ownership, and transfer of development rights. ECL § 57-0119(6)(j); ECL § 57-0119(7)(b); ECL § 57-0121(6)(f). Accordingly, the Plan established a Pine Barrens Credit Clearinghouse to facilitate the transfer of development rights from the sending areas to receiving areas through the issuing, monitoring, brokering, purchasing, and selling of credits.

Obtaining Pine Barrens Credits for sending area property is a two-step process. First, an owner may request and receive a Letter of Interpretation issued by the Pine Barrens Credit Clearinghouse which determines the number of Pine Barrens Credits generated by an individual tax parcel. This document specifies the total number of credits that may be allocated to a given parcel of property in the sending area. Pine Barrens Credits are allocated to property in the sending areas based upon a set formula that takes into account a parcel's size and zoning category (prior to the Plan's enactment).[1] As of December 20, 1996, 219 Letters of Interpretation allocating 221 Pine Barrens Credits were issued for Core Preservation Area parcels within the three towns.

Having obtained a Letter of Interpretation for the property, the landowner may proceed to the second step, obtaining a Pine

[1]The program also incorporates an appellate process by which a property owner may seek and obtain a greater allocation of Pine Barrens Credits if the owner is dissatisfied with the allocation established by the formula.



Barrens Credit Certificate. A landowner obtains a certificate by recording a conservation easement for the sending area property. The conservation easement permanently limits the future uses of the sending area parcel as defined in the conservation easement.[2] The owner then receives the Certificate following the recording of the conservation easement with the County Clerk. For the majority of small property landowners, participation in the Pine Barrens Credit Program will not involve any out-of-pocket expenses. In exchange for the conservation easement, the Pine Barrens Credit Certificate permits certain land uses to be transferred to the receiving area.

Landowners who have received a Pine Barrens Credit Certificate may use the credit in one of several ways. First, landowners can sell the Certificate directly to the Clearinghouse, and the Commission established the prices that the Clearinghouse will pay for Pine Barrens Credits. The Clearinghouse will purchase Pine Barrens Credit Certificates from any Core Preservation Area property owner wishing to sell one or more Pine Barrens Credit Certificate(s) or a portion thereof. The Clearinghouse has a five million dollar revolving fund to purchase Certificates. Any Pine Barrens Credits purchased by the Clearinghouse can then be sold by the Clearinghouse, and the proceeds from such sales will be reinvested by the Clearinghouse to replenish the fund and to purchase future Pine Barrens Credit Certificates. ECL § 57-0119(6)(j).

[2]Once a conservation easement is recorded and the Pine Barrens Credits are transferred, the sending parcel is entitled to a reduction in assessed value under the Town Law §261-a(2)(d), and a corresponding reduction in real property taxes will result.

Second, holders of Pine Barrens Credit Certificates could also sell their credits to another landowner or developer on the private market. The value of a credit lies in the ability to redeem it for the right to increase development beyond that permitted by current zoning. To facilitate the development of this private market and to match interested buyers with interested sellers of Pine Barrens Credits, the Clearinghouse publishes on a monthly basis the Pine Barrens Credit Registry. *See* ECL § 57-0121(6)(f). A third option for an owner of property in both the sending and receiving areas is to transfer the credits from the sending parcel to the receiving parcel.

Notably, the Plan ensures that holders of Pine Barrens Credit Certificates may convert that certificate into an actual land use in the receiving area "as of right" by providing that "the redemption of Pine Barrens Credits entitles a person to an increase in intensity or density in accordance with this Plan . . . with no additional special permit required" within the same town. *See* Plan at § 6.4.1.1.

## ARGUMENT

### TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS, INCLUDING THE PINE BARRENS CREDIT PROGRAM, PROTECT ECONOMICALLY BENEFICIAL USES OF PROPERTY

Should the Court reach the merits of the respondent's transferable development rights program, New York urges the Court to follow the teachings of its landmark ruling in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 137 (1978), *affirming*, 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977), and reconfirm that properly designed transferable development



rights programs provide economically beneficial uses.[3] In contrast, petitioner's overly-broad attack, by ignoring both *Penn Central* decisions and the fact that the transferable development rights *are* of value to the petitioner, could undermine land use programs that seek to protect watershed areas, farmland, and open space. Petitioner seems intent on shoehorning this case into either *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or an onerous troop deployment. Pet. Br. at 32-3. Neither scenario applies to this case in particular or transferable development rights programs in general: *Lucas* was grounded on the factual finding by the state trial court that the Beachfront Management Act "rendered [the two lots] valueless," 505 U.S. at 1009, while the Third Amendment protects against such hypothetical troop deployments. In contrast, here the property retains value and there has been no physical invasion either by the public or troops. Aside from physical invasions and regulations involving the destruction of *all* value, the Court has eschewed a rigid, bright-line test in favor of an "ad hoc, factual inquir[y] into the circumstances of each particular case."

---

[3]New York submits that the Ninth Circuit correctly decided the ripeness question. Petitioner's counsel, it seems, would like to have it both ways. On the one hand, they would like to press a legal challenge and bypass the respondent planning agency's review of the actual transfer of petitioner's economically beneficial uses. On the other hand, petitioner's unilateral decision not to apply for the transfer of her economically beneficial uses prevented the agency from fulfilling its duty to review the actual transfer of petitioner's valuable beneficial uses, and thus permitted her counsel to argue that the program is a "ruse." *See Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359, 363 (9th Cir. 1996); Pet. Br. at 9 (questioning "if any [recipients] can be found"). Thus, petitioner, by her unilateral actions, has forced the agency to defend a legal challenge and impeded it from responding to her allegations.

*Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993).

A number of transferable development rights programs exist throughout New York State, *e.g.*, *Penn Central*, 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977), *affirmed*, 438 U.S. 104 (1978), and throughout the nation, *e.g.*, *Gardner v. New Jersey Pinelands Commission*, 125 N.J.193, 593 A.2d 251 (1991). State and local governments, each "serv[ing] as a laboratory," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), are searching for innovative ways to address competing land use, planning, and environmental issues. Each transferable development rights program is distinct, with different components and procedures, and designed to address different situations. Consistent with well established Fifth Amendment jurisprudence, each of these programs must be analyzed on its own particular facts.

Properly constructed transferable development rights programs do not deprive property owners of all economically beneficial uses of their property. Rather, such programs, like the Pine Barrens Credit program, ensure that the economically beneficial use is transferred to other parcels of land. *Penn Central*, 42 N.Y.2d at 334, 397 N.Y.S.2d at 920. Transferable development rights programs do not leave the transferable economically beneficial use in "legal limbo." *Penn Central*, 42 N.Y.2d at 336, 397 N.Y.S.2d at 921; *Fred French Investing Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, *cert denied*, 429 U.S. 990 (1976). Some programs incorporate a bank or clearinghouse that stands ready to purchase certificates or rights from willing landowners and thereby provide greater certainty. *Id.* Other programs include clearly delineated receiving areas. *Id.*



Twenty years ago, in rejecting a challenge to New York City's historic preservation regulations, the New York Court of Appeals ruled that the transfer of such economically beneficial uses "may be considered as part of the owner's return on the property." *Penn Central*, 42 N.Y.2d at 328, 397 N.Y.S.2d at 916. In affirming the New York Court of Appeals, this Court recognized that landowners retained "valuable" uses under the historic preservation and transferable development rights program, and that, therefore, they were not denied all use of any so-called "pre-existing air rights." 438 U.S. 104, 137. Specifically, the Court stated that the "ability to use those rights has not been abrogated; they are made transferable to at least eight other parcels in the vicinity. . ." *Id.* Moreover, the landowner's retention of such valuable uses under the transferable development rights program "nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Id.* The same rationale should apply with equal force to the present case and in other cases involving transferable development rights programs.

## CONCLUSION

Despite petitioner's criticisms on the Tahoe Regional Planning Agency's transferable development rights program, the record in this case demonstrates that her Mill Creek property provides her with valuable, economically beneficial uses. Accordingly, there is no categorical taking.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Dated: Albany, New York
January 9, 1997

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

BERNADINE SUITUM,

*Petitioner,*

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF OF THE STATES, NEVADA, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI

Nevada, Hawaii, Vermont, Montana, and Maryland submit this brief as *amici curiae* in support of respondent Tahoe Regional Planning Agency (TRPA).

The *amici* states have a strong interest in regulations affecting land use planning, as well as transfer of development rights programs. The issues involved in the instant lawsuit are of great importance to these states as they attempt to plan for the future and control and direct development to provide for their citizens' health, welfare and other needs.

The Ninth Circuit's decision must be sustained in order to maintain traditional state authority in the area of land use planning, to protect and preserve transferable development rights programs and finally, but not least importantly, protect the water quality of Lake Tahoe.

## STATEMENT OF THE CASE

Lake Tahoe, situated on the border between California and Nevada, is surrounded by the Sierra Nevada Mountains on the west and the Carson Range on the east. The Tahoe Basin comprises 192 square miles. While the lake accepts the runoff from melting winter snow and numerous small tributaries, it has one outlet, the Truckee River, which flows east to Nevada where it eventually empties into Pyramid Lake.

High in its alpine setting and the tenth deepest lake in the world, Lake Tahoe is eutrophying as the result of human development. Extremely clear with low concentrations of nutrients which support the growth of water-clouding algae, the lake is renowned for its stunning clarity. Until recently, Lake Tahoe had a 10,000-year history of near equilibrium in gain or loss of nutrients. Presently, Lake Tahoe is suffering an increase in algal productivity and a decline in clarity due to an elevated load of sediments and nutrients. As a result,

the lake is experiencing a loss in water quality. *See Kelly v. TRPA*, 106 Nev. 638, 641, 855 P.2d 1027, 1029 (1993).

The land surrounding the lake is held by private, federal and state owners. An early history of logging, mining, ranching and development has been replaced by a large and growing emphasis on tourism and recreational use. Commercial and residential development continue with some limitations. Located within hours of major population centers such as San Francisco, Sacramento, and Reno, the lake attracts millions of visitors and suffers from the same overuse problems that plague other urban recreational areas. Fink, *Public Land Acquisition for Environmental Protection: Structuring A Program for the Lake Tahoe Basin*, 18 Ecology L.Q. 485 (1991).

The Lake Tahoe Basin is also recognized as a natural resource, exceptionally vulnerable to the ravages of development:

> Tahoe's scenic beauty has been its undoing. Widespread commercial development to accommodate the crowds of people that flock to its shores has resulted in an alarming rate of environmental deterioration.

Strong, *Tahoe: An Environmental History*, (U. of Neb. Press 1984) at xiii. *See also* Furgurson, *Lake Tahoe--Playing for High Stakes*, National Geographic (March, 1992).

In 1974, Robert Bailey, a researcher with the United States Forest Service, was assigned to the Tahoe area to help TRPA find appropriate strategies for reversing the deteriorating environmental trends in the Basin. He then observed:

> Since the late 1950's, the Lake Tahoe basin has been subjected to rapid development for various purposes. This expansive growth has been



> responsible for many improper land development procedures, including failure to recognize hydrologic and topographic limitations, unnecessary and widespread destruction of vegetal cover, realignment and pollution of streams, encroachment on flood plains, and disruption of natural drainage . . . . *Deterioration has reached a point where human activities that induce sedimentation are probably the chief threat to environmental quality in the basin.*

Bailey, *Land-Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning*, (1974), at 1 (emphasis added).

In response to these and other problems, TRPA was created by a congressionally-approved, and state-ratified, Interstate Compact. Pub.L. No. 91-148, 83 Stat. 360 (Act of Dec. 18, 1969), NRS 277.190, to protect the natural resources of the Lake Tahoe Basin. The United States Congress, as well as the compacting states of California and Nevada, expressed in the Tahoe Regional Planning Compact that the Tahoe region exhibits unique environmental and ecological values which are irreplaceable. They stated there is public interest in protecting, preserving, and enhancing these values for the residents, as well as visitors to the region, and that the waters of the lake are threatened with deterioration or degeneration, which endanger both the natural beauty and economic productivity of the region. They concluded that responsibility for preserving scenic and natural areas is divided between local governments, regional agencies, both states, and the federal government. Tahoe Regional Planning Compact, Article I(a), codified at NRS 277.200.

Upon creation, the agency began a process by which it categorized all the land in the basin. In 1980 major amendments were adopted by way of the Tahoe Regional

Planning Compact. Finally, in 1987 the TRPA issued its Code of Ordinances to implement its regional plan for the basin.

The key challenge for TRPA was to develop a regional plan which could somehow cope with incessant demands for additional growth and development in a region already suffering from a lack of resource capacity to handle *existing* development. Of particular concern were thousands of single-family lots created years ago without regard to environmental constraints.

Among other criteria, the Code of Ordinances established and defined stream environment zones (SEZ) as land where evidence of surface water flows, riparian vegetation, near surface ground water, or alluvial soils exist. The boundaries of the SEZ are set, and no new development is allowed in a delineated SEZ. The purpose of identifying the SEZ is to prevent non-point source pollution and thereby protect the water quality of Lake Tahoe.

Based on site specific investigations, numeric values were assigned to lots based on location, slope, vegetation, and drainage. A score was established above which building on a lot was permitted and below which it was prohibited. For lot owners with restricted parcels a system was developed to allow them to purchase or sell transferable development rights (TDR).

Generally, TDR programs envision severing development potential from land, treating it as a commodity, and selling this potential. These programs were created to allow lands, like those within TRPA's jurisdiction, a means of providing an economic return to their owner. These programs have become widespread, encouraging farmland preservation, historic preservation, open space, and environmental protection. The programs rest on the marketability of TDRs.



The TDR program, developed by TRPA, involves three components: transfer of land coverage, transfer of residential development rights and transfer of residential allocations. Numerous transfers of these components have been approved as a result of TRPA's 1987 Regional Plan. Once the transfer occurs, the transferring parcel is then retired from availability to develop. The acquiring parcel is benefitted by having use of the transferred rights.

Petitioner filed a Complaint that alleged the TRPA's land use regulations have resulted in an unconstitutional regulatory taking of her property in violation of the Fifth Amendment to the U.S. Constitution. Specifically she claims that since her lot is located in a SEZ it is valueless. However, Petitioner failed to determine the value of the TDRs she possessed.

## SUMMARY OF ARGUMENT

Petitioner Suitum's claim should be denied for the following reasons. Petitioner's claim is not ripe because she failed to obtain a final decision from the TRPA, the regulatory agency which enacted the land use regulations of which she complains, before commencing her action. While residential development was prohibited on her lot, she failed to fully investigate the value of the TDRs she possessed by virtue of property ownership. She also failed to attempt to obtain from the county a residential allocation which would have value as well.

The TDRs Petitioner has are a "use" of the property and therefore no taking has occurred. Since development rights can be bought and sold they have value. The value of the development rights was never determined by Petitioner. Because of her failure to do this, and the testimony presented by Respondent TRPA, the Ninth Circuit was correct in concluding the TDRs had significant value.

There is an important distinction between this case and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, there was a finding by the trial court that Lucas's property was valueless. In this case, there is no such finding. Petitioner simply asserts her property has no value.

Further, in *Lucas* the Court held that a taking does not occur when the act prohibited by regulation would be prohibited by the state's common law of nuisance. The regulations that TRPA enacted regarding land use were specifically done to prevent water pollution from occurring. TRPA's actions to protect the waters of Lake Tahoe are consistent with the common law of nuisance and are therefore a legitimate exception to the categorical taking rule as stated in *Lucas*.

## ARGUMENT

### I. PETITIONER'S CLAIM THAT A REGULATORY TAKING OCCURRED IS NOT RIPE FOR JUDICIAL REVIEW.

This Court noted in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), that a regulatory takings claim has two components. First, the aggrieved party must establish that the regulation has in substance "taken" his property; and second, he must demonstrate that any proffered compensation is not "just."

To make a determination of the first factor, the Court stated it will look to see if the questioned regulation "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This criterion as explained by Justice Holmes has become the standard in regulatory takings analysis. A court is unable to determine if a regulation has "gone too far" unless it knows how far the regulation goes. Therefore,



> [a] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

*Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). Before a determination can be made regarding how far a regulation goes, a court must make an initial inquiry to determine if the plaintiff's claim is ripe for decision.

Beginning with *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court has applied ripeness rules to "taking" litigation. In *Agins*, plaintiffs claimed that a land use regulation had taken their property. The city ordinance permitted one to five single-family residences on plaintiffs' land and required the submission of a development plan so that the city could determine how many residences it would allow within this range. The Court remanded the case because plaintiffs had failed to submit the required development plan. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (Court dismissed a taking attack on federal surface mining act because plaintiff had not presented concrete controversy or sought variance or waiver from the act's provisions).

The ripeness rule was then further clarified in *Williamson County*, 473 U.S. at 172. The regional planning commission had approved a preliminary residential subdivision development. However, a few years later, the commission refused to approve a revised subdivision plat. By the time the revised subdivision plat was submitted, the zoning ordinance had been revised to reduce the total number of residential units permitted. The Court held it could not evaluate the takings claim until the administrative agency had arrived at a "final definitive position." Secondly, the Court decided the case was

not ripe because the developer had failed to avail itself of a state statute that authorized compensation awards in inverse condemnation actions. The second prong of *Williamson County* is not at issue here because there is no taking.

The "final decision rule" is at issue in this case. The Ninth Circuit Court determined that Petitioner failed to show that before filing suit she sought a final decision from TRPA as to the application of its regulations to her property. Specifically, Suitum did not pursue the transfer of development rights before filing suit. The circuit court found that "[b]y failing to apply to the TDR program, Suitum denie[d] TRPA the ability to grant a 'different form [ ] of relief . . . which might abate the alleged taking.'" *Suitum v. TRPA*, 80 F.3d 359 (1996) at 362, *citing*, *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir.), *cert. denied*, 502 U.S. 498 (1990). Without attempting to transfer the rights she possesses, Suitum cannot know the nature and extent of the permitted development. Because she failed to do this, the court was unable to assess the full economic impact or the degree of the regulations' interference with reasonable investment-backed expectations.

Previously, in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 103 (1978), this Court held that a landowner is not denied economically viable use of property unless the regulation does not allow any reasonable use of the property. Reasonable investment-backed expectations, also a taking factor introduced in *Penn Central,* requires a court to consider the bundle of rights that constitute property ownership. This Court has not held that a regulation that limits or destroys "one strand" from the bundle is a taking. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). Prohibiting construction, a traditional "use," would be one such lost "strand." Another important strand from that bundle is the right of alienation. It is this right that Suitum retains by either selling her property outright or by separating the development rights from it and selling them. Finally, *Penn Central* held that a landowner cannot



claim a taking because a regulation interferes with her "ability to exploit" a property interest she believed was available for development. *Penn Central*, 483 U.S. at 130.

In *Williamson County*, 473 U.S. at 200, the Court acknowledged the difficulty of determining if a regulation goes too far and concluded,

> [R]esolution of that question depends . . . upon an analysis of the effect the . . . regulations had on the value of [the] property and investment-backed profit expectations.

The circuit court analyzed the value of Suitum's development rights between $10,000 and $21,500, and with "an allocation right the value increases by approximately $30,000." *Suitum*, 80 F.3d at 363. Since Suitum failed to determine the market value of her TDRs, she prevented the court from analyzing the program's effect on "investment-backed profit expectations."

The Ninth Circuit recognized that one purpose of the TDR program was to facilitate alternative uses of the property. The court rightly concluded that the TDR program was a "use" of Petitioner's property in that the inquiry was on "any reasonable beneficial use." *Suitum*, 80 F.3d at 363, *citing*, *MacDonald*, 477 U.S. at 349. The circuit court concluded that, although unusual, the fact that Suitum was transferring development rights from her property and not making a reapplication of development plans for her property was immaterial. Both procedures would provide finality as to the value of the property.

Suitum responded by arguing it would be futile to engage in the TDR program because it was "a sham." The circuit court found no merit in the Petitioner's claim that the TDR program was a sham. In fact, the circuit court found "significant value" in her TDRs. *Suitum*, 80 F.3d at 363.

First, contrary to Petitioner's claim, there is a genuine market for the sale and purchase of TDRs in the Tahoe Basin. Petitioner failed to present credible testimony to the trial court that the TDR program was a ruse or that even if she engaged in it, her property would be valueless. Suitum simply speculates the value of the TDRs would be inadequate or nonexistent and therefore she should not have to bother determining such value.

Secondly, TDR programs are a well-established and effective method for land use planning. These programs operate at the local level so communities can achieve a wide variety of land use goals. As this Court has previously noted in *Agins*, 447 U.S. at 262, local communities have an "interest[] in assuring orderly development of residential property with provision for open-space areas." An important element in the development of these local TDR programs is that they provide property owners with increased flexibility and options, as compared to traditional "prescriptive" land use regulatory programs. Landowners can receive market value for sales of development rights and "receiving" landowners can obtain opportunities for additional development.

Currently, TDR programs are working effectively in many states. Foremost is New York City's TDR ordinance which was the subject of the decision in *Penn Central*. The States of New York and New Jersey both have programs to protect their pinelands. Collier County, Florida, has a TDR program to protect wetlands and open space. Finally, California has made extensive use of local TDR programs. *See* Pruetz, *Putting Transfer of Development Rights to Work in California* (Solano Press 1993).

This Court in *Penn Central* upheld the denial of a building permit to construct an office tower above a railroad terminal. *Id.* at 137. The Court observed the TDRs did have value and served to mitigate the effects of the historic preservation law. The Ninth Circuit acknowledged that



TRPA's regulations provide for a use of what could be undevelopable property. The court stated, "transfer of development rights is a use of SEZ property." *Suitum*, 80 F.3d at 363. TDRs comprise an essential component of the value of the property because they constitute an economic use to which the property may be put.

The Petitioner alleges that TRPA's application of its regulations amounted to a taking in that she was deprived of *any* use thereof. It is true Suitum is prevented from building a house on the property because of the property's SEZ classification. However, denying a landowner a particular use of her property does not in itself rise to a takings claim. The fact that a *particular* use denied by government may also be the most beneficial in the eyes of the landowner does not render the regulation unconstitutional. *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962).

## II. SUITUM'S CLAIM IS SIGNIFICANTLY DIFFERENT FROM THE CLAIM IN *LUCAS*.

There are two important factors in Suitum's case that differentiate it from *Lucas*. First, there is no finding that Suitum's property is valueless. This is a critical distinction between this case and *Lucas*. Second, *Lucas* permits an exception to the categorical takings rule where the land use is proscribed based on state common law. The historically recognized common law of nuisance prohibits actions which cause water pollution.

### A. SUITUM'S PROPERTY IS NOT VALUELESS

In *Lucas*, 505 U.S. 1003, the Court described two discrete categories of regulatory action as generally compensable without the need to make case specific inquiry into the public interest advanced. These it described as categorical taking. Neither the first category, regulation that compels a

property owner to suffer a physical "invasion" of her property, nor the second category, regulations denying the property owner "all economically beneficial or productive use of land," *Id.* at 2893, is at issue here. The *Lucas* Court relied on the suggestion of the dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting), "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." This Court determined that a total denial of all use is a taking even if the purpose of the regulation is to prevent a harm rather than confer a public benefit.

Of critical importance in *Lucas* was the trial court's finding that the lots owned by Lucas had been rendered valueless. In the present case the trial court has made no such determination. Indeed, on appeal the Ninth Circuit specifically concluded that Suitum failed to ascertain the value of her property by "apply[ing] for the transfer of her development rights through the TDR program . . ." *Suitum*, 80 F.3d at 364. Suitum argues that since she cannot build a house on her property it is therefore valueless, an argument without merit by virtue of her failure to investigate the value of her TDRs.

The concurring opinion in *Lucas*, 505 U.S. at 1033-34, acknowledged the finding "that a beachfront lot loses all value because of a development restriction" as "curious." There is no finding Suitum's lot is valueless. The circuit court found Petitioner presented no evidence as to the value of her land. It would appear equally curious that property in the Lake Tahoe Basin is rendered valueless because of a development restriction.

Suitum argues that she could have constructed a house on the property at the time she bought it but cannot now do so because of TRPA's regulations. In *Lucas*, 505 U.S. at 1031, the Court stated "changed circumstances or new knowledge may make what was previously permissible no longer so." This is consistent with the Court's prior holding



in *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919), in which Justice Holmes stated:

> [A] business lawful today may in the future, because of the changed situation, growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good.

*Id.* at 500.

The TRPA's action does not restrict Suitum's right to dispose of her property. It is only a declaration that its use for certain purposes is prejudicial to the public interest. The power which the states have to prohibit use by individuals of their property in ways harmful to the health, morals, or safety of the public, is not, and consistent with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted to inflict injury upon the community at large.

### B. LAND USES CREATING A NUISANCE FALL WITHIN THE EXCEPTION TO THE CATEGORICAL TAKING RULE

Land use planning has a long history of regulating development to satisfy the competing needs of communities. TRPA has enacted land use controls to respond to changes in the environment ans to attempt to solve environmental problems at Lake Tahoe. TRPA's actions are consistent with historical common law prohibitions of nuisance.

Comprehensive land use regulation, as a constitutionally valid method for regulating the uses to which an owner might put his real property, is rooted in the late teens and early twenties of this century. The first comprehensive zoning

ordinance in the United States was enacted in 1916 in the City of New York. *See Miller v. Board of Public Works*, 195 Cal. 477, 485, 234 P. 381, 383 (1925). During the following nine years, a bulletin of the United States Department of Commerce showed that 35 states and the District of Columbia had adopted this form of regulation. Pursuant to those comprehensive land use regulations, 221 municipalities had been zoned and over 22,000,000 inhabitants, aggregating 40 percent of the urban population of this country, are living in zoned territory. *Id.* at 486. When the United States Supreme Court set its seal of approval upon the constitutionality of this new type of legislation in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the cycle was completed and comprehensive zoning had taken its place as a constitutionally recognized part of our legal and political system.

This Court has held that TRPA is a political subdivision of the state. *Lake Country Estates v. TRPA*, 440 U.S. 391, 401 (1979). Like other political subdivisions, it has the ability, as well as the obligation, to enact regulations that protect the health, morals, and safety of the people. The authority to protect the people arises from the state's police powers. Regulations properly enacted represent the exercise of this governmental power, and though their consequences may limit use of private property, their injunction does not constitute a taking within the meaning of the Constitution nor does it entitle the owner of such property to compensation from the state or its agents, or give him any right of action. *See Mugler v. Kansas*, 123 U.S. 623, 668 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking. . .").

As Justice Kennedy's concurring opinion in *Lucas*, 505 U.S. at 1034, stated:



> The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police powers of the State to enact limitations on the use of their property. [Citations omitted.]

Where a state "reasonably conclude[s] that 'the health, safety, morals or general welfare' would be promoted by prohibiting a particular contemplated use of land," compensation is not necessary. *Penn Central*, 438 U.S. at 125. As this Court has maintained, land use planning which advances a legitimate state interest will not effect a taking. *Penn Central* concludes that the goal of preserving a valuable cultural resource was a valid exercise of the police power. *Id.* at 129. As well, the Court in *Agins*, 447 U.S. at 261, found "Tiburon's zoning ordinance advanced legitimate state goals because it protected the city's residents from the ill effects of urbanization. "

The use proscribed by TRPA's actions is residential construction in a stream environment zone. Construction in such zones is contributing to the degradation of the waters of Lake Tahoe. Independent scientists who have studied Lake Tahoe for many years have concluded that: (1) the lake has lost approximately 23 feet of transparency over the last 20 years, with a present loss rate of 1.5 feet per year; (2) watershed runoff is the prime contributor to declining water quality; and (3) disturbance of soils in the watersheds of the Tahoe Basin is directly linked to the steady and increasing pollution to the waters of Lake Tahoe. (Goldman and Byron, *Changing Water Quality at Lake Tahoe: The First Five Years of the Lake Tahoe Interagency Monitoring Program* (1986) at 6-8; *See also* California Tahoe Conservancy, *A Report on Soil Erosion Control Needs and Projects in the Lake Tahoe Basin* (March 1987) at 9-13; and California State Water Resources Control Board, *Final Lake Tahoe Basin Water Quality Plan* (1983) at 77-79, 163-165.) Summarizing the urbanization of Lake Tahoe that has occurred in recent years, one observer noted:

> As a result of this urban boom, all aspects of environmental quality within the Tahoe Basin declined. . . . Marshes and meadowlands, the habitat of many wildlife species, increasingly succumbed to the bulldozer. Even more alarming, the crystal-clear waters of Lake Tahoe revealed signs of increased pollution in spite of the introduction of a modern sewage disposal system that pumped effluent out of the basin. The growth of algae in the lake appeared to be increasing at an exponential rate, and the clarity or its water lessened.

Strong, *Tahoe: An Environmental History* at 196.

TRPA's action demonstrates a responsible approach in the development of laws and policies, which are responsive to rapid changes in the physical environment and to newly acquired knowledge about the environment, to attempt to solve the environmental problems confronting the lake. TRPA is obligated to deny uses which might have been permissible in the past before man's actions made everyone aware of civilization's potential for destruction of the natural environment.

The Takings Clause does not require a static body of state property law, but rather the state should be permitted to enact new land use regulations in response to changing conditions. *See Lucas*, 505 U.S. at 1035.

While the holding in *Lucas* rejects the reliance on a legislature's recitation of a "noxious use" as justification for departing from the "categorical takings rule," it did clarify that there is no taking when the proscribed use was already prohibited by the owner's property title or the state's common law. *Lucas*, 505 U.S. at 1029.



This Court conditioned the categorical taking rule explaining that a regulation that results in a total taking will nonetheless be upheld if it does

> no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

*Lucas*, 505 U.S. at 1029.

Nevada's Supreme Court recognizes that common law nuisances include that class of wrongs caused by unreasonable, unwarrantable, or unlawful use by a person of his own property, or by his improper, indecent, or unlawful conduct which operates as an obstruction or injury to the rights of another, or to the public, and which produces such material annoyance, inconvenience, discomfort, or hurt that the law presumes consequent damage. *Bliss v. Grayson*, 24 Nev. 422, 56 P. 231 (1899).

The causal relationship between development of sensitive lots and the pollution of Lake Tahoe's unique waters is thoroughly documented and is undisputed in this case. Indeed, the second of the two specific examples cited in *Lucas* as illustrations of land use regulation that would pass constitutional muster, even if the impact were to totally destroy a private parcel's economic value, was development activity on a private lakeshore parcel that floods adjoining property. *Lucas*, 505 U.S. at 1029. The parallel between that hypothetical and the case of lake pollution caused by adjacent development is obvious. For over one hundred years federal and state courts have found it within government's legitimate power to abate nuisances to prevent upland development activities that trigger pollution of adjacent waterways. *See, e.g., Woodruff v. North Bloomfield Mining Co.*, 18 F. 753 (9th Cir. 1884);

*People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152 (1884); *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374 (1897); *Gulf, Colo. & Santa Fe Ry. v. Reed*, 80 Tex. 362, 15 S.W. 1105 (1891); *Horn v. Seeger*, 167 Kan. 532, 207 P.2d 953 (1949).

Petitioner's claim falls squarely in the *Lucas* exception based on clearly developed historical antecedents founded in the common law of nuisance. Instead of being newly legislated, TRPA's authority for action is inherent in Suitum's property title. Such authority stems from the background principles that federal and state common law of property and nuisance already place upon land ownership.

Common law principles do not permit a landowner from engaging in activities that spread contamination. Whatever rights a landowner may have, it is difficult to imagine a right to pollute would be one of them. A property owner cannot expect to put property to a use that creates a nuisance even if that is their preferred use. Creating a nuisance was never part of the owners "bundle of rights." Thus it is unreasonable for a landowner to expect such uses would never be formally prohibited.



## CONCLUSION

The judgment of the circuit court should be affirmed. The Court should hold that a regulatory taking did not occur.

Dated: January 7, 1997

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In The

# Supreme Court of the United States

October Term, 1996

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No. 96-243

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**BERNADINE SUITUM,**
*Petitioner,*

**v.**

**TAHOE REGIONAL PLANNING AGENCY,**
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF DR. STEVEN BERRY, DR. ROBERT BURCHELL, DR. ROBERT CERVERO, DR. ROBERT CONSTANZA, DR. BENJAMIN CHINITZ, DR. ROBERT HEALY, DR. JOHN KEENE, DR. DAVID LISTOKIN, DR. JAMES NICHOLAS, DR. C. FORD RUNGE AND MR. RICHARD TUSTIAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37, we file this brief with the consent of the parties as *amici curiae* in support of respondent Lake Tahoe Regional Planning Agency.[1]

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of Court.

*Amici* are economists with expertise in land use and regulated markets. They have an interest in helping this Court to understand the economic results of existing and proposed takings rules. Many amici have "in the trenches" experience in the effort to make land use regulations both more efficient and more equitable.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This brief is submitted by economists with expertise in land use and regulated markets[2] to provide economic data and analysis which may be of assistance to the Court in resolving this case. A fundamental issue in this case is whether the value of a Transferable Development Right ("TDR") should "count" in deciding the threshold question of whether a land use regulation does not effect a taking requiring the payment of just compensation under the Fifth Amendment. Amici believe that, from the standpoint of sound economic policy, the answer should be "yes."

TDR programs provide a valuable market mechanism for improving upon both the effectiveness and equity of traditional land use regulations. Traditional land use regulations reflect a serious conflict between the legitimate need of State and local governments to regulate land uses to

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address important public concerns and the legitimate interests of individual landowners in reaping the financial rewards of land ownership. To balance these interests, traditional land use programs often severely limit development in certain parts of the community or on certain types of land, while at the same time attempting to accommodate at least some development on each parcel to avoid potential takings liability. The result is a land use regulatory system which has failed to adequately control the location of development, producing economically inefficient "sprawl" development patterns, serious public safety problems such as excessive flooding, and losses of valuable environmental resources. At the same time, the current system has sometimes produced significantly unequal and severe effects on different landowners.

Transfer of Development Rights programs offer a market-based tool for mitigating this conflict. By severing the issue of the appropriateness of restrictions on land use to achieve important public purposes from the issue of the owner's entitlement to an equitable share of the community's total development potential, TDR programs provide the opportunity to both accomplish the goals of effective regulation and achieve greater equity. Unequal economic impact is a necessary and unavoidable consequence of appropriate land use regulation because it would not be socially beneficial to allow all lands to be developed to the same degree. Even the same rule affects different properties differently because of their different physical characteristics, proximity to infrastructure and market conditions. TDR programs provide a mechanism for *improving* upon the fairness of the current land use system through more similar treatment of landowners while allowing for necessary differences in the regulation of different lands. As discussed below, the promise of TDR programs is confirmed by extensive experience around the country with functioning

TDR markets that yield substantial economic benefits to landowners.

Petitioner proposes that the takings clause be read to require sharply different treatment of TDR programs which achieve the same or greater equity as traditional zoning density controls. Under this view, traditional density controls on land use would continue to be constitutional, despite the fact such controls frequently have widely unequal impact on different landowners, but TDR programs would be of no value to State and local officials in avoiding constitutional takings judgments. As a result, they would have a strong incentive to continue to rely on traditional density controls and perpetuate the conflict of interests described above.

The continued reliance on density controls to address land use concerns, which do not reduce the magnitude of development but simply spread it out, would exacerbate the dispersal of development or "urban sprawl." Recent economic studies and reports document the high public and private financial costs of sprawl Providing public services to dispersed communities is significantly more costly than providing those services to concentrated communities. Other recent studies have attributed to this land use pattern part of the responsibility for the increasing costs of congested transit systems, air and water pollution, and loss of prime farmland and natural resources.



## ARGUMENT

### I. TDR Programs Are a Valuable Tool for Making Land Use Regulation Fairer and More Effective.

#### *A. The Promise of TDR Programs.*

Our nation's current land use practices and policies often reflect a collision between competing values. On the one hand, to address the financial, social, and environmental costs of some land development, state and local governments have imposed land use regulations that, like many other government actions, can have highly differential economic impacts. On the other hand, our social values -- and the language of the Bill of Rights -- require careful consideration of the property interests of those individuals or firms who may be disproportionately affected by land use regulation.

These competing forces have created a situation which can be less than optimal from both social and individual standpoints. Faced with the desire to limit demand for new government services, and limit the impact of development on existing communities, while assuring some economic use for each landowner, land use regulations have relied heavily on density controls.[3] These controls limit the permitted amount of development on a per acre basis. As discussed in more depth below, see Section IV, the effect of density restrictions has been to spread out development in a manner that has been recognized to have high economic and social costs. At the same time, these regulatory systems have left little or no

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3 "Euclidian zoning" named after the form of zoning approved in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is the dominant land use regulatory approach across the country. *See* Platt, R.H., *Land Use and Society: Geography, Law & Public Policy* 215-48 (1996). Zoning regulates the density of development, the dimensions or bulk of buildings with minimum lot sizes. *Id.* at 235.

role for markets to encourage development in those locations where development is most valuable.

Land use regulations have also recognized the different physical attributes of land and the economic, health and environmental costs involved in the development of such areas as floodplains and coastal erosion zones, fire hazard zones, and areas where development can disproportionately contribute to water pollution, such as wetlands and riparian zones. But lacking alternative tools to create equity, officials often permit some limited development in sensitive areas such as flood hazard zones that undermine the goals of the regulation. (For example, flood damages have risen steadily, even on a per capita basis adjusted for inflation, over the last fifty years despite some restrictions on new development in flood areas. *See* The Federal Interagency Floodplain Management Task Force, *Floodplain Management in the United States*, Vol. 1, Summary at 17 (1992).

On the other hand, the current land use regulatory system often has uneven impacts on different landowners, and has probably helped spawn increasing litigation over the "takings" question. Some development for all does not mean equal economic impacts. Moreover, the inherent limitations of density controls as a tool for addressing development costs tend to lead local officials in the direction of applying this tool more and more aggressively in an effort to make it work -- to attempt to reduce new development to the minimum, instead of to attempt to channel that development into places where it can be more easily serviced.

Traditional land use tools that spread development may be less productive of aggregate property values than alternative regulatory mechanisms such as TDR's that concentrate development or restrict it in sensitive areas while encouraging it in others. A number of studies have revealed



that environmental amenities, such as water and air quality -- whose protection has motivated land use restrictions -- can indeed enhance the private property values of residential communities.[4] Studies have also shown that development restrictions tend to trigger increases in property value of developable properties, and local officials could reasonably conclude that growth restrictions are a sound strategy for increasing local property values as a whole.[5] The equity problem arises, of course, because the restricted property owner may not share in this increase.

Transferable Development Rights provide a quasi-market solution to this paradox that has the potential to accomplish more effectively the goals of land use regulations while also increasing their fairness. By allowing a parcel's development potential to be severed and sold separately from the land itself, TDR programs offer officials an escape from the problem that limiting development on some land now also means limiting the development rights of the landowner. Instead, TDR programs can pursue development restrictions where they make sense and offer landowners a fair share of community development rights on condition that some or all of those rights be exercised off-site.

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4 For a recent example of studies showing how improved water quality increases the value of lakefront property, *see* H.J. Michael, *et al*, *Water Quality Affects Property Prices: A Case Study of Selected Maine Lakes* (1996) (demonstrating association between lake water quality and lake front property). Studies showing strong relationships between property valuess and air pollution include R.G. Ridker & J.A. Henning, "Determinants of Residential Property Values with Special Reference to Air Pollution," *Rev. Econ. Stat.* 246-259 (1967); John Nelson, "Residential Choice, Hedonic Prices and the Demand for Urban Air Quality," 5 *J. Urb. Econ.* 357-69 (1978).

5 *See, e.g.*, Katz, Lawrence & Kenneth Rosen, "The Interjurisdictional Effects of Growth Controls on House Prices," 30 *Journal of Law and Economics* 149-60 (1987); David Segal & Philip Srinivasan, "Impact of Suburban Growth Restrictions on Urban Housing Price Inflation 1975-1978," 6 *Urban Geography* 14-26 (1985).

In most TDR programs, landowners retain all the rights of landownership, including the right to exclude others, except that they must exercise some or all of their development rights elsewhere in the community. They have a market for TDR's because developers in growth zones -- instead simply of receiving a windfall from the restrictions on others -- must purchase development rights from landowners in restricted zones to avail themselves of the opportunity for greater development. In this way, the property-enhancing value of restrictions is shared among restricted and unrestricted landowners because the value of TDR's will increase as the value of development increases in the community as a whole.

TDR programs also create an opportunity to exploit the efficiencies inherent in marketplace transactions among private parties. By designating growth zones where different parcels can freely compete in the market for development rights, they create areas where market forces, and not regulatory restrictions, will determine the precise locations where development rights are exercised.

*B. TDR Programs Are Effective in Practice.*

Across the country, there are numerous examples of substantial Transferable Development Rights programs which are actually operating and providing substantial returns to owners of restricted lands. Contrary to the contention of the petitioner in this case that TDR programs represent a "sham," actual experience demonstrates that these programs have succeeded in improving both the effectiveness and fairness of State and local regulatory programs.

THE NEW JERSEY PINELANDS. The New Jersey Pinelands is a 1.1 million region of southern New Jersey.



The United States Congress and the New Jersey Legislature passed legislation calling for the protection, preservation and enhancement of the unique ecological, cultural, educational, agricultural, scenic, recreational and public health values of the Pinelands. *See* N.J. Parks and Recreation Act of 1978, §502(a)(c), 16 U.S.C. §471I; State Pinelands Protection Act, N.J. Stat.Ann.Sec. 13:18A-2. The goal of the resulting Comprehensive Management Plan was to manage these important resources, with a minimal roll for public acquisition.[6] The Pinelands was not simply an environmental preserve. The 1980 population within the area of the Pinelands amounted to 559,454.[7] By 1990 this population had grown to 699,778,[8] and increase of 25%. The region produces approximately 24% of New Jersey's total agricultural income,[9] with cranberries and blueberries being particularly significant.

The Pinelands management plan divided the total region into five districts: the Preservation Area, the Forest Area, the Agricultural Production Districts, the Rural Development Districts, and the Regional Growth Districts. One of the components of the plan was restricting development of much of the ecologically sensitive property within the Preservation, Forest and Agricultural Production districts. At the same time, the Plan announced a Transferable Development Rights program to reduce the impacts of the plan on

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6 The total amount designated for acquisition is $26 million from the federal government with a 25% state match. The total would be $32.5 million for land acquisition. *See* U.S. Dept. of the Interior, *Draft Environmental Impact Statement, Proposed Comprehensive Management Plan for the Pinelands National Preserve* 3.4 (Undated)

7. New Jersey Pinelands Commission, *Pinelands Development Credits, Survey Report Through December 31, 1995* (1996).

8. *Ibid.*

9. *Ibid.*, p. 5.22.

property values, especially within the Preservation and Forest Areas.

The "Pinelands Development Credits" program has now been in place for 14 years, and data on the program's implementation demonstrate the program's success in ensuring a reasonable return to landowners in the restricted areas. *See* New Jersey Pinelands Commission, *Pinelands Development Credits, Summary Report, Through December 31, 1995* (1996). Since inception, 4,232 development rights have been "severed" under the PDC program, resulting in the protection of 12,969 acres of land within the district. The owners of these "protected" areas retained, in addition to the opportunity to sell development rights, the right to engage in certain land uses, such as agricultural activities. Table 1 and 2 in the Appendix summarize activity to date under the PDC program.

The average price paid for a development right was $3239, with a maximum of $5650 and a minimum of $1750. The allocation of 4,232 transferable rights equates to a projected $12,700,176 in value. The value per acre for transferred development rights was approximately $1,000. The number of rights allocated, the average price per development right, and the projected total value of the development rights sold, by year, are shown in Table 3 in the Appendix.

MONTGOMERY COUNTY, MARYLAND. Montgomery County is located immediately north-west of the District of Columbia. It comprises a land area of about 500 square miles, and has a current population of over 800,000 people. Its population has grown rapidly and consistently over the past 40 years.

In 1969, the County Council adopted a General Plan, called "Wedges and Corridors," to accommodate growth in a central corridor pattern and preserve the adjacent "wedge"



areas for rural, agricultural, and open space uses. The goal of the plan is to accommodate urban growth in an efficient and cost effective manner, while also maintaining the quality of the natural environment to the maximum extent possible.

By the late 1970's, the pressure to build scattered residential subdivisions in the wedge areas was threatening the continuing viability of the General Plan, and the county's remaining agricultural industry was in danger of erosion and flight from the area. In response, the county established a 110,000 acre Agricultural Reserve and other related regulations to help preserve the agricultural industry and achieve the concentrated development goals of the plan. Lands within this reserve were downzoned from one dwelling unit per five acres to one dwelling unit per 25 acres. In return, owners were allocated one TDR for each five acres of land.

In the fifteen years this program has been in operation, over 5,000 TDR's have been sold and transferred. TDRs are now an accepted element of the real estate market in Montgomery County. Since 1981, the initial price of about $5,000 per TDR has risen to today's average of about $11,000 per TDR. With each transferred TDR putting 5 acres of reserve land under easement, this equates to a selling price of over $2,000 per acre. (Data provided by Richard Tustian. *See also* R. Roddewig & C. Ingraham, *Transferable Development Rights Programs* (1987)).

SANTA MONICA MOUNTAINS. The California Coastal Conservancy administers a TDR program on behalf of the California Coastal Commission. This program does not issue a prescribed number of rights per land unit. Rather, Transferable Development Rights were allocated to property based upon the "developability" of the property. TDR allocation could be as much as one per acre or less, depending

on the property's "developability." The rights initially sold for as much as $43,000 per right, with rights later selling in the mid-$30,000 range. *Ibid.*

THE LONG ISLAND PINE BARRENS. A Central Pine Barrens Joint Planning and Policy Commission was created to develop means of protecting the pine barrens that are environmentally necessary to Long Island. One component of this program is a Transfer of Development Rights program.

The Pine Barrens program allocates rights to the owners of property within the Pine Barrens generally on the basis of the prior zoning. These rights can then be used to increase residential density within "receiving areas" designated by the three Towns -- Brookhaven, Riverhead, and Southampton. This program was adopted in June, 1996. Initial estimates are that these rights will command prices in the $12,000 range. Depending on the prior zoning, the market value of the rights is expected to be between $12,000 and $2,500 to $3,000 per acre. *See* Nicholas, J., *A Report to the Pine Barrens Credit Clearinghouse on the Value of Development Rights Within the Towns of Brookhaven, Riverhead, and Southampton* (1996).

## II. Petitioner's Proposed Constitutional Rule Would Favor Traditional Low Density Zoning, Encourage Sprawl and Perpetuate Inequity.

Petitioner contends that the value of a Transferable Development Right should "count" for the purpose of a takings claim, if at all, only in determining what portion of "just compensation" a takings claimant might have received. Contrary to the established precedent established by this Court, *see Penn Central Transportation v. City of New York,*



438 U.S. 104 (1978), petitioner maintains that the value of the TDR "stick" in the property owner's bundle of rights should not be considered in assessing the economic impact of this type of regulatory program on the owner's property as a whole.

This new approach to the treatment of TDR programs under the takings clause would treat land use programs that rely on Tradeable Development Rights dramatically differently from programs that rely on traditional low density zoning controls. For a variety of sound reasons discussed below, the Court has always recognized that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1028, 1027 (1992). Accordingly, in the land use context, the Court has repeatedly recognized that significant limitations on both the character and density of development are entirely consistent with the Constitution, even if they significantly reduce the value the property would have if unrestricted. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (rejecting takings challenge to restriction of one building to five acres which allegedly reduced property value by 85%); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (upholding a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety ); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (rejecting takings challenge to zoning restrictions which allegedly reduced the value of property by 75%); *see generally Keystone Bituminous Coal Assn. V. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987) ("[T]he Court has repeatedly upheld regulations that destroy or adversely affect real property interests."). By contrast, petitioner's theory would hold unconstitutional TDR programs even when those programs provide greater economic value for landowners and more equitable economic treatment overall.

An example illustrates this anomalous differential treatment. According to established law, zoning density restrictions that limited the number of residential units on a per acre basis and, for example, "reduced" the potential development value of the property by 50%, would not be found to be a taking. On the other hand, under petitioner's theory, a Transfer of Development Rights program that had the same 50% economic impact, except that the owner's development rights could only be exploited off site rather than on site, would be found to be a taking. Implementing a TDR program would therefore result in heavy fiscal liability for State and local officials. Allowing state and local governments to offset the value of the TDR against their taking liability, as petitioner proposes, would not alter the fact that the petitioner's rule would create takings liability for the TDR program and not for the traditional system with the same, or even greater economic effects.

Faced with such discriminatory constitutional treatment of TDR programs, State and local officials would be forced to continue their present heavy reliance on low density zoning that does not reduce overall development but simply spreads it out. The likely result of petitioner's takings rule would therefore be more urban sprawl, and its associated increase in the costs of providing public infrastructure such as roads and essential public services, such as fire and ambulance protection and schooling. Attempting to develop TDR programs that also would guarantee some intensive development of each parcel would not provide an effective solution to sprawl. Guaranteeing development of each parcel would deprive TDR's of their utility for limiting sprawl and other unwanted forms of development, and indeed would encourage scattered development leading to more sprawl. Furthermore, if petitioner's theory were adopted, efforts to concentrate



development, even where they produce aggregate increases in property values, would be less likely.

Finally, adoption of petitioner's theory would perpetuate the inequities inherent in the traditional land use regulatory system by forcing State and local officials to rely heavily on density controls, which force them into pursuing policies with unequal impacts in order to achieve necessary and important public objectives.

## III. Unequal Impacts on Different Landowners Are an Inevitable Consequence of Reasonable and Necessary Land Use Regulations Which TDR Programs Can Help Mitigate.

For a variety of basic economic reasons, land use regulations inevitably have different economic impacts on different landowners that are beyond the reach of the takings clause. These inherently uneven impacts occur not merely because different types and levels of restrictions are appropriate for different properties but because the same restrictions can have dramatically different economic impacts on different lands. Many of these inequities can be at least partially addressed by TDR's. If, as petitioner contends, TDR's cannot be considered in making a takings determination, TDR's would have essentially no value to State and local governments for achieving greater equity while pursuing important public policies. In other words, petitioner's proposed takings rule, rather than advancing the equity concerns animating the takings clause, would more likely undermine efforts to address these concerns.

Regulations have differential impacts on different landowners in part because, as the Court has recognized on various occasions, legitimate police power concerns warrant different degrees of regulation of lands that have different physical characteristics. For example, in *First Lutheran*

*Church v. Los Angeles County,* 482 U.S. 304 (1987), Justices Blackmun, O'Connor, and Stevens recognized that a regulation prohibiting hazardous development in a floodplain is almost certainly not a taking whatever its economic impact. *See also First Lutheran Church v. Los Angeles*, 210 Cal. App. 3d 1353, 1370, 258 Cal. Rptr. 893 (1989), *cert. denied*, 493 U.S. 1056 (1990) (finding no taking on remand). Similarly, as Justice Kennedy noted in his concurring opinion in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1001, 1035 (1992): "Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."

Some of these incontrovertibly necessary and valid restrictions are widespread. More than 80% of communities in the United States heavily restrict development in floodplains, including prohibition of virtually all development in the most fast-moving area of flood waters. [10] And these restrictions have been broadly upheld even when they appeared to reduce the value of property significantly.[11] Development is also routinely prohibited or

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10 See Federal Interagency Floodplain Management Task Force, *Floodplain Management in the United States: An Assessment Report,* Vol. 2 at 6-23, Table 6-3 (1992) (revealing that 82% of all communities with flood hazard areas participated in the federal flood insurance program). The minimum requirements of the federal flood insurance program are that communities adopt ordinances prohibiting significant fill in the floodway, the fast-moving portion of floodplains, and requiring that structures be elevated on stilts or otherwise protected against flooding in the remainder of the 100 year floodplain for 100 year floods. *Id.* at 11-8, 11-9. These restrictions appear to be highly successful in reducing flood damages in that structures built after promulgation of the regulations have made flood insurance claims less than one quarter as frequently as pre-regulation structures. *Id.* at Vol. I at 31.

11 *See, e.g., Adolph v. Federal Emergency Management Agency,* 854 F.2d 732 (5th Cir. 1988) (holding that FEMA flood control regulations



heavily limited in the United States where soils do not support septic systems and sewers are not available.

Even where restrictions permit identical development opportunities, the economic impacts can differ dramatically. Density restrictions may leave different properties each the same right to develop a house, but that development opportunity may be worth a great deal in some locations and not in others.

The different configurations in which land is held also influence the impact of regulations. Minimum lot sizes, a street setback requirement or a prohibition on building in riparian zones may have positive impacts on the value of a larger parcel of land, which may benefit from contiguous setback areas that extend through their property. But these restrictions may require that smaller parcels of land in those restricted zones be merged with adjacent parcels to realize economic value.

Regulatory programs also necessarily have disproportionate impacts on different landowners because a variety of neighboring public and private investments greatly influence the suitability of different parcels for different uses. The physical solidity of real property may appear to give it an intrinsic value that is independent of neighboring activities, but as early as the nineteenth century, the German economist J.H. von Thunen recognized that the actual value of land heavily depends on its location in relation to other

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were not a taking as a matter of law); *April v. City of Broken Arrow,* 775 P.2d 1347 (Okl. 1989) (upholding ordinance regulating development in floodplain); *Usdin v. State Department of Environmental Protection,* 173 N.J. Super. 311, 414 A.2d 280 (1980) (upholding state prohibition against structures in floodway); *Foreman v. State Department of Natural Resources,* 387 N.E.2d 455 (Ind. 1979) (same); *Pope v. City of Atlanta,* 242 Ga. 331, 249 S.E.2d 16 (1978), *cert. denied,* 440 U.S. 936 (1979) (upholding impervious cover restriction in floodplain prohibiting tennis court).

activities. *See* J.H. von Thunen, *The Isolated State* (1826). This insight is carried forward to the present day by the real estate industry cliche that the three most important factors determining property value are "location, location, location." The interdependence of property values with neighboring private and public investments means that similar regulatory policies will often affect different properties in highly unequal ways. (Indeed, the public demand for land use regulations that make them ubiquitous arises from the concern that neighboring land uses could otherwise adversely affect the value of developed property. Government actions influence a property's value as much by the restrictions on other land as on the property itself.)

Examples of government actions that differently affect the value of different properties range from infrastructure investments like highways and railroads, to economic policies toward land intensive industries such as farm policies, to land use and environmental laws. Studies of the impact of highways on land values have found that highways can increase the value of some suburban land to which they extend access by as much as 750% while decreasing the value of lands with less access by 50%.[12] Studies of federal agricultural policies show that they can greatly increase the value of some lands, but not others.[13]

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12 J.H. Lemly, *Expressway Influences on Land Use and Value: Atlanta 1941-1956,* Report to the State Highway Department of Georgia. Bureau of Business Research, Georgia State College 92 (1958). For studies showing similarly different results ranging from 54% difference to 106% difference for lands with differing degrees of highway access, *see* U.S. Department of Transportation, *Social and Economic Effects of Highways* (1974).

13 Some of the largest differences have been found in the different impacts of the federal tobacco program, increasing the value of land that had a large tobacco allotment by a large percentage over land that was not favored by the program. *See, e.g.*, M. Shuffett and J. Hoskins, "Capitalization of Burley Tobacco Allotment Rights into Farmland Values, 51 *American Journal of Agricultural Economics* 471-74 (1969) (adding value of $6,015 per acre to farms with tobacco allotments); V.L. Vantreese, M.R. Reed & J.R. Skees, "Mandatory Production Controls and Asset Values: A Case Study of Burley Tobacco Quotas," 70 *American Journal of Agricultural Economics* 319-25 (1989) (adding 38.9% to the value of farmland in 1976).



The uneven effect and regulatory treatment of traditional land use regulations in part simply reflect the unequal results of these other government policies. For example, it is rational and constitutional for state and local governments to zone land for commercial or industrial development where the public has already invested in various forms of infrastructure.[14] (Studies have then found that different zoning categories can have dramatically different land values).[15] Even identical regulatory restrictions will have different economic effects depending on the proximity to publicly funded roads, sewers and so on (as well, of course, on the compatibility of other neighboring private development).[16] The uneven economic impact of land use regulations therefore reflects other governmental policies and forces that have their own inevitably uneven affects.

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14 For a study suggesting that land use rules in Chicago did respond to other government infrastructure and therefore facilitate differences in land values, *see* Daniel P. McMillen & John F. McDonald, "Urban Land Value Functions with Endogenous Zoning," 29 *J. Urb. Econ.* 14-27 (1991).

15 See Paul Asabere & Peter Colwell, "Zoning and the value of Urban Land," 8 *Real Estate Issues* 22-27 (1984) (commercially zoned land worth 80% more than average and single family residential land worth 50% below the average).

16 For example, access to highway interchanges increased the differential economic impact of differing zoning categories in one 1981 study of urban fringe areas around Chicago. David L. Chicoine, "Farmland values at the Urban Fringe: An Analysis of Sale Prices," 57 *Land Economics* 351-362 (1981).

In all the cases described above, TDR's can contribute to greater equity. They can be used to provide development rights to those in areas like floodplains who might otherwise have only minimal development opportunities under traditional regulation. They can address the hardship situation of the landowner whose land falls entirely in a setback zone

TDR's also may allow landowners who have development rights but little development value the opportunity to overcome some of the disadvantages of their locations -- an inequality that is often an accident of the location of government infrastructure. TDR programs will typically select growth receiving areas for TDR credits where growth can be serviced by existing infrastructure. By allowing landowners whose development rights have little value on their own land the opportunity to sell rights to those in growth areas where development rights have greater value, landowners throughout a community can partake of the benefits of central location.

TDR's can also improve equity by permitting a greater sharing of the reciprocal benefits of land use rules. These different reciprocal benefits may actually give some lands a false appearance of a decline in value simply because those lands have unequally shared in the rise in values. Land use restrictions may be said to decrease value as a result of the restrictions but increase value as a result of the restrictions on others. It is extremely difficult to measure the net impact. Indeed, the common method of comparing the value of restricted property with unrestricted property is likely to be inaccurate because the value of unrestricted property in a regulated world where it benefits from the restrictions on others does not reveal what its value would be in the absence of regulation.



One study concluded, for example, that new restrictions limiting land development in the sensitive New Jersey Pinelands to one house in 40 acres did not decrease the land's value when compared with "control" land just outside the Pinelands region.[17] The study also revealed, however, that the restrictions greatly increased the value of existing developed land in the Pinelands. Although the individual landowner might feel himself deprived because his land would have far greater worth if it could be intensively developed while other restrictions remained in place, the net impact on the restricted landowner (in part because of TDR's) was not significant.

But TDR's can improve on this situation because they provide a new tradeable development opportunity that can be exercised in the intensive growth zones in the community. TDR programs provide a mechanism to more equitably distribute the value-enhancing effects of many regulations.

Finally, TDR's provide a mechanism for achieving equity that does not require significant sacrifice of the purpose of a regulation. If the only tool government officials have for treating landowners equally is by allowing some development on each parcel of land, then the pursuit of social objectives requiring the differential treatment of different properties will likely be undermined. TDR programs allow State and local governments to pursue regulatory purposes more effectively while also achieving greater equity

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17 Beaton, P.W., "The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands," 67 *Land Economics* 172 (1991). Another study of restricted developments within a broad buffer area around the Chesapeake Bay found similar impacts. *See* Beaton, P.W. & M. Pollock, "Economic Impact of Growth Management Policies Surrounding the Chesapeake Bay," 68 *Land Economics* 434-53 (1992).

For all these reasons, a takings rule that disregarded the value of TDR's would probably freeze their development and undermine values animating the takings clause.

## IV. Urban Sprawl Imposes Substantial Economic and Social Costs on the Public as Well as Private Citizens and Firms.

As discussed above, the objective of limiting development costs while allowing some development for each parcel of land has helped to make density restrictions of varying character the predominant form of land use regulation in America. *See* Platt, R.H., *Land Use and Society: Geography, Law and Public Policy* 233 (1996). Density restrictions are not the only cause of dispersed development, or "urban sprawl," but they facilitate and encourage it by spreading out development.[18] One of the serious implications of petitioner's takings is the potentially serious economic inefficiencies associated with this "urban sprawl."

Over the last several years, a variety of different interests have identified urban sprawl as a serious and increasing national problem. For example, as stated in a 1994 report about sprawl in California, issued by a coalition led by Bank of America: "[A]s we approach the 21st Century, it is clear that sprawl has created enormous costs that California can no longer afford. Ironically, unchecked sprawl has shifted from an engine of California's growth to a force that now threatens to *inhibit* growth and degrade the quality of life." Bank of America *et al*, *Beyond Sprawl: New Patterns of Growth to Fit the New California* (1995). *See generally* "Drawing the Hard Line of Urban Sprawl," T.

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18 In 1983, roughly two thirds of all both existing (67%) and new (62%) U.S. Housing units were single family homes on separate lots, and most of these lots were created in accordance with specific subdivision ordinances. Platt at 297.



Egan, *The New York Times*, December 30 & 31, 1996 (two part series on problem of sprawl in western United States); Reid Ewing, "Is Los Angeles Style Sprawl Desirable," 63 *J. Am. Pla. Ass.* 107-126 (1997).

At root, the problem of inefficient land use patterns, or "sprawl," derives from the fact that American land use policies and practices have produced increasingly diffuse settlement patterns. While most of the nation's central cities are deteriorating, the extent of urbanized lands is growing exponentially. For example, the urban area surrounding New York City expanded by 65% between 1960 and 1985, despite the fact the population of the region grew by only 8% in the same period. New York Regional Plan Association, *The Region Tomorrow* (1990). Cleveland's urbanized area expanded by 33% between 1970 and 1990 even though its population actually fell by 11%. Lincoln Institute of Land Policy, *Alternatives to Sprawl* 5 (1995). On a national basis, the amount of land devoted to urban use has nearly tripled between 1960 and 1990 while average density fell by more than one third.[19] Real estate professionals have predicted that urban land use will grow in the future at 8 to 12 times the rate of employment and population expansion. Leinberger, C.,"Metropolitan Development Trends of the Late 1990s: Social and Environmental Implication," *in* Diamond, H.L and P. Noonan, *Land Use in America* 220 (1996).

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19 There is no one measurement of urban areas. This figure measures urban areas as calculated by the U.S. Department of Census, which expanded in square miles from 24,111 to 61,014 between 1960 and 1980 while average density fell from 4,090 to 2,589. Platt, R. H. *Land Use and Society: Geography, Law and Public Policy* 23 (1996). Measured by metropolitan areas, which include some open land between more urban areas, the land area devoted to urban uses rose from 6% of the land area to 19% between 1950 and 1992. Between 1960 and 1980, central city populations declined from 68 million to 59 million while suburban populations grew from 59 million to 101 million. *Id.* at 22.

Sprawl development increases the cost of providing public facilities and services to residents and businesses. As common sense suggests, the costs of virtually every public facility and service -- from road construction and maintenance, to fire protection, to water and sewer service, and so on -- increases with a more scattered development pattern. *See* Frank, J. E., *The Costs of Alternative development Patterns: A Review of the Literature, Urban Land Institute* 39 (1989). If sprawl is associated with the abandonment of previously urbanized areas, these costs may simply represent net additions to the tax bill without any corresponding increase in public benefits. In the Minneapolis/St. Paul metropolitan region, for example, the number of children of school age declined by almost 80,000 in the 1970's and 1980's, resulting in the closure of 132 schools, but new sprawl development necessitated the construction of 41 new schools on the metropolitan fringe. Lincoln Institute of Land Policy, *Alternatives to Sprawl* at 22.

A number of studies have quantified the public costs of sprawl in great detail. The 1995 Bank of America-led study concluded that the costs of new roads, schools and other infrastructure "often have the effect of doubling a new homeowner's property tax bill." Bank of America *et al* at 6. Recent studies have estimated the costs of sprawl versus more concentrated development plans for the State of New Jersey, Lexington, Kentucky and the Delaware Estuary region, finding that sprawl would impose additional infrastructure costs ranging from 14.8% to 25% for roads and 6.7% to 15% for utilities.[20] The New Jersey study

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20 Burchell, Robert W., et al. I*mpact Assessment of the New Jersey Interim State Development Plan, Report III: Supplemental Al PLAN Assessment,* Report prepared for New Jersey Office of State Planning x-xx (1992); Burchell, Robert W. and David Listokin, *The Economic Effects of Trend Versus Vision Growth in the Lexington Metropolitan*



estimated that generally concentrated growth plans would likely save a total of $1.3 billion in capital and operating costs for municipalities and State government over twenty years. The Delaware study also found that the overall costs of providing schools was reduced by 6.9% with a more concentrated development pattern.

The Urban Land Institute in 1989 reviewed more than thirty years of studies and concluded that on average a three unit per acre development located 10 miles from central facilities and employment patterns cost $48,000 in new infrastructure costs. If that new development were placed closer to existing infrastructure and in somewhat greater density, the public costs declined by half. Frank, James E., *The Costs of Alternative development Patterns: A Review of the Literature, Urban Land Institute* 39 (1989).

Apart from these public costs, sprawl also imposes higher private costs on private citizens and businesses. Perhaps most significant of all is the increased automobile use associated with dispersed land development patterns. Many studies have confirmed the common sense intuition that dispersed development is strongly associated with increased reliance on the automobile. U.S. Congress Office of Technology Assessment, *Saving Energy in U.S. Transportation* 199-212 (1994) (reviewing the studies). Sprawl development increases automobile costs both by increasing the need for families to operate more than one car (77% of all households with two or more adults now have at least two vehicles) and by increasing the miles driven (up by 200% between 1960 and 1990 even as population increased only 40%.). E.W. Johnson, *Avoiding the Collision of Cities*

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*Area,* Report prepared for Bluegrass Tomorrow 129 (1994); Burchell, Robert W., William Dolphin and Harvey S. Moskowitz, *Impact Assessment of DELP CCMP Versus Status Quo on Twelve Municipalities in the DEP Region.,* Report prepared for the Delaware Estuary Program. 12 (1995).

*and Cars: Urban Transportation Policy for the Twenty-first Century,* Report of a Study Project sponsored by the American Academy of Sciences in Cooperation with the Aspen Institute (September 1993). Similarly, the Bank of America-led study concluded that the automobile consumes 20% of the budget of the average Californian.

The costs of sprawl are also reflected in dramatic and growing increases in congestion. The General Accounting Office of the U.S. Congress found that traffic delays resulting from congestion increased by 57% between 1985 and 1988. United States General Accounting Office, *Traffic Congestion: Trends, Measures and Effects* (1988). The costs, in terms of time delays, wasted fuel and insurance premiums are generally estimated to be "in the tens of billions of dollars and . . . rising rapidly." Office of Technology Assessment at 112. The Bank of America-led study cited research finding that average commuting times in two developing counties in California increased by 13% in only 10 years, and it attributed a significant loss of business from the State to this rise in congestion. *Bank of America* at 6.

Additionally, apart from these direct economic costs, sprawl imposes other types of adverse impacts on society, including increased air and water pollution and rapid loss of valuable natural resources. Highway vehicles contribute roughly 35% of volatile organic compounds, the primary contributor to urban smog. Office of Technology Assessment at 130. While the level of pollutants emitted by each car has declined enormously under the Clear Air Act, these technological advances been heavily offset by an increase in the number of vehicle miles traveled of nearly 200% between 1960 and 1990 (while the population grew by only 40%.) As discussed above, this recent increase in automobile usage is related to more dispersed settlement patterns. Moreover, efforts to address increased automobile



use and greater air pollution resulting from sprawl through more reliance on mass transportation are undermined by the economic impracticality of constructing mass transit to service highly dispersed populations. Office of Technology Assessment at 193, 211 (finding that any effort to increase reliance on mass transit must be combined "with strong development controls and incentives" for concentrated development).

Sprawl development also results in a great increase in impervious surface area with resulting increases in water pollution as well as flooding problems. *See generally* Klein, R.D., "Urbanization and Stream Water Quality," 15 *Water Resources Bulletin* 4 (1979). In growing suburban counties in Maryland and Virginia, the growing runoff pollution associated with sprawl has more than offset expensive pollution controls on factories and sewage treatment plants. *See* Cohn-Lee, R.G. & D.M. Cameron, "Urban Stormwater Runoff Contamination of the Chesapeake Bay: Sources and Mitigation," 14 *Environmental Professional* 10-27 (1992). In the Chesapeake Bay, for example, this runoff contributes more toxic pollutants than factories and sewage treatment plants. *Id.* In the Pacific Northwest, increasing suburbanization is blamed for larger and more frequent floods. T. Egan, *The New York Times*, December 30, 1996.

Finally, sprawl development is the driving force behind the rapid loss of some of America's most fertile farmland. According to the Bank of America-led study, California's Central Valley lost almost half a million acres of farmland between 1982 and 1987. This study also concluded that sprawl has undermined the agriculture economy indirectly by reducing the productivity of farmland as a result of pollution, undermining agricultural infrastructure, and destabilizing land markets. Nationwide, between 1982 and 1992, cropland area decreased by 39 million acres, a decrease of 9%. U.S.

Department of Agriculture, Soil Conservation Service, *1992 National Resources Inventory*.

As the Montgomery County and other examples discussed above show, TDR programs can help to limit sprawl equitably. TDR's have been recommended as a regulatory tool for controlling sprawl and its associated costs by builders and planners alike.[21] By contrast, a takings rule that held that each parcel of land must be individually developable would encourage further dispersal of development and foster more inefficient land development nationwide.

## CONCLUSION

For all the foregoing reasons, if and to the extent the Court deems it appropriate to reach the merits in this case, amici urge the Court to conclude that the value of a Transferable Development Right is appropriately taken into account in determining whether a taking has in fact occurred.

---

21 *See, e.g.*, The Baltimore Sun (Feb. 18 1996), 1996 WL 6605863 (quoting L. Earl Armiger, president of Maryland Builders Association, as recommending TDR's to limit sprawl and encourage building in older suburbs); Stanley D. Abrams, "Flexible Zoning Techniques to Meet State and Local Growth Policies," C930 *ALI-ABA* 537, 547 (1993) ("The TDR concept is becoming the front line defense in preventing sprawl and leap-frog development.")

# APPENDIX

**Table 1**

| PINELANDS DEVELOPMENT CREDITS 1981-1995 | |
|---|---|
| NUMBER OF DEVELOPMENT RIGHTS CREATED | 33,200 |
| TOTAL ACREAGE OF SENDING AREA | 840,100 |
| NUMBER OF RIGHTS ALLOCATED | 4,232 |
| NUMBER OF RIGHTS SEVERED | 1,477 |
| FIRST TIME SALE OF RIGHTS | 1,089 |
| RESOLD RIGHTS | 339 |
| ACRES PROTECTED THROUGH SEVERANCES | 12,969 |

SOURCES:

1. New Jersey Pinelands Commission, "Pinelands Development Credits, Summary Report Through December 31, 1995," (1996).

2. New Jersey Pinelands Commission, "Pinelands Development Credits: A Landowner's Guide," (1981).

**Table 2**

| PINELANDS PRESERVATION AREAS | |
|---|---|
| PRESERVATION AREA DISTRICT | 368,100 Acres |
| FOREST DISTRICT | 386,500 Acres |
| AGRICULTURAL PRODUCTION DISTRICT | 85,500 Acres |
| TOTAL PRESERVATION ACREAGE | 840,100 Acres |

SOURCE: U.S. Dept. of the Interior, "Draft Environmental Impact Statement, Proposed Comprehensive Management Plan for the Pinelands National Preserve," 4.13 (undated).

**Table 3**

**PROJECTED VALUE OF PINELANDS DEVELOPMENT CREDIT ALLOCATIONS 1981 - 1995**

| | RIGHTS ALLOCATED | AVERAGE PRICE | VALUE OF RIGHTS |
|---|---|---|---|
| '81 | 332 | | $830,000 |
| '82 | 662 | $2,500 | $1,655,000 |
| '83 | 518 | $2,500 | $1,295,000 |
| '84 | 217 | $2,500 | $542,500 |
| '85 | 123 | $2,425 | $298,275 |
| '86 | 30 | $2,031 | $60,938 |
| '87 | 44 | $2,500 | $110,000 |
| '88 | 38 | $2,500 | $95,000 |
| '89 | 386 | $2,508 | $967,942 |
| '90 | 714 | $3,878 | $2,769,016 |
| '91 | 269 | $3,517 | $946,146 |
| '92 | 34 | $3,532 | $120,085 |
| '93 | 246 | $3,518 | $865,370 |
| '94 | 504 | $3,525 | $1,776,478 |
| '95 | 115 | $3,204 | $368,426 |
| TOTALS | 4,232 | | $12,700,176 |

SOURCE: New Jersey Pineland Development Bank.

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In The

# Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

*Petitioner,*

v.

TAHOE REGIONAL PLANNING AGENCY,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF AMICUS CURIAE OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENT

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## INTERESTS OF AMICUS CURIAE*

The American Planning Association ("APA") is a non-profit association of 27,000 members, all of whom are employed in the field of land use planning or are otherwise vitally concerned with the discipline.

Virtually all members of APA are engaged in land use planning either on behalf of governmental bodies exercising regulatory authority over the use of real property or for the benefit of holders of land subject to land use regulation. Consequently, APA does not represent the interests of those who seek to increase the constitutionally permissible scope of government regulation nor of those who promote the interests, constitutional or otherwise of individual landowners. APA and its members are fundamentally and vitally interested in the promotion of the rational, predictable, effective, and beneficial use of real property consistent with the needs of individuals having recognized interests in property and the public at large. APA members are the professionals who engage in the planning to accomplish that fundamental goal.

## SUMMARY OF ARGUMENT

Mrs. Suitum's takings claim is not ripe because she has not submitted an application for a development rights transfer that would determine the economic impact of the regulatory system on her property. Neither is there evidence in the record that Mrs. Suitum's property is

* The consents of the parties to the filing of this *amicus* brief are on file with the Clerk.

made valueless by the Tahoe Regional Planning Agency ("TRPA") regulations, and this Court has held that the retention of some value in property is enough to defeat a takings claim. This Court has made clear that under its takings jurisprudence there is no assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

Mrs. Suitum's filing of a building permit application did not satisfy the requirement that she make at least one application for approval because it was clear under TRPA's regulations that the building permit could not issue. However, there is a tension between the *Agins-MacDonald* rule that a landowner must submit one "meaningful" application and the *Hamilton Bank* rule that a landowner must utilize all available administrative relief at the local level. This tension creates a weakness in ripeness law that, frankly, some local governments have exploited to frustrate "as-applied" takings claims in federal courts.

This weakness in ripeness law promotes uncertainty in land use decision making by local governments that ultimately undermines the rational, predictable, effective and beneficial use of property – goals of vital concern to *Amicus curiae*. Because of these two rules, a landowner whose proposal has been denied has an agonizing choice. Should she "reapply" with something "less ambitious," or apply for relief from the land use agency? What is "meaningful" and what is "grandiose" within the limits of a planning and zoning program is a matter of judgment. *Amicus curiae* believes the Court should resolve this tension between these two rules and create a more precise



and fair basis for determining when federal courts have jurisdiction in takings cases.

*Amicus curiae* submits that it is the developer who should decide whether she wishes to reapply for a land use approval or risk litigation on her takings claim over the denial of one application. This Court should also clarify the confusion in the lower federal courts over the scope of the reapplication rule and hold that while the one application rule is always applicable to "as applied" challenges, the reapplication requirement is not relevant to substantive due process and equal protection claims. Because such claims challenge the *rationality* of a regulatory decision and do not require proof that a landowner's property has been rendered valueless by the regulation, these two claims do not require speculation on what forms of less intensive development a local government might have permitted.

This Court required applicants specifically to apply for a variance to make their takings claims ripe, but it should recognize that a variance is only one type of administrative relief available to landowners. The type of administrative relief available depends upon the land use regulatory system the local government has adopted. The transfer of development rights system option available in this case is simply another form of administrative relief available in many land use regulatory systems.

This Court should also recognize a *futility* exception to the ripeness rule and should apply it after a landowner has made one application for a land use approval or administrative relief. Landowners should be able to rely

on a number of factors, including official statements and local land use policies and regulations, to show futility.

This Court should also eliminate the second prong of the ripeness doctrine that requires landowners to seek and be denied just compensation through available state procedures. Landowners with regulatory takings claims should be able to pursue their federal compensation remedy in federal court.

## ARGUMENT

The Petitioner, Mrs. Suitum, did not seek authorization for transferable development rights ("TDRs") under the land use and development regulations of the Respondent, the TRPA. Therefore, the Court of Appeals for the Ninth Circuit properly held that Plaintiff's regulatory taking claim was premature under the "finality requirement," the first prong of the ripeness standard enunciated in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The Ninth Circuit stated:

> Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form [ ] of relief . . . which might abate the alleged taking." Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis.

*Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359, 362-63 (9th Cir. 1996) (citations omitted).



### I. MRS. SUITUM'S TAKINGS CLAIM IS NOT RIPE BECAUSE SHE DID NOT SUBMIT AN APPLICATION FOR TRANSFERABLE DEVELOPMENT RIGHTS (TDRS) TO ENABLE A COURT TO DETERMINE THE EXTENT OF ECONOMIC IMPACT OF TRPA'S LAND USE REGULATORY SYSTEM.

In the context of land use regulation, this Court's ripeness doctrine was intended to address the Article III posture of *regulatory takings* claims by determining if, and the extent to which, the decision maker has inflicted a concrete economic injury to the plaintiff. Ironically, the first land use case in which this Court applied the ripeness doctrine was *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978), a case involving land use regulations that also included provisions for use of transferable development rights (TDRs). The Court rejected a taking claim based on a refusal of the city's landmarks commission to approve a high-rise building over Grand Central Terminal, which had been designated an historic landmark. In rejecting Penn Central's taking claim, this Court based its decision

on lack of ripeness on two factors, noting first that Penn Central had "not sought approval for the construction of a smaller structure" than the proposed 50-story office building. *Id.* at 137. For this reason, the Court did "not know" whether the plaintiff would be denied "any use" of the airspace above the Terminal building. Second, the Court noted that Penn Central could not accurately assert that it had "been denied *all* use" of its "pre-existing air rights" because these rights were transferable to other parcels. *Id.* As to the relevance of the city's TDR program to the takings claim, the Court stated:

> While these [TDR] rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, *are to be taken into account in considering the impact of regulation.*

*Id.* (citation omitted) (emphasis added)

### A. There is No Evidence in the Record that Mrs. Suitum's Property Has Been Rendered Valueless.

In order to conclude that the finality requirement of the ripeness doctrine allows Mrs. Suitum to stop short of making any application under the TDR program, it must be assumed that Mrs. Suitum's property has been rendered *valueless* under TRPA's regulations.[1] However,

[1] Of course, even if that were true, this Court has held that in some circumstances a law that renders property valueless may nonetheless not constitute a taking. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 313 (1987); *Goldblatt v. Hempstead,* 369 U.S. 590, 596 (1962); *United States v. Caltex, Inc.,* 344 U.S. 149, 155 (1952), *reh'g denied,* 344 U.S. 919 (1953); *Miller v. Schoene,* 276 U.S. 272 (1928); *Hadacheck v. Sebastian,* 239 U.S. 394, 405 (1915); *Mugler v. Kansas,* 123 U.S. 623, 657 (1887); *cf. Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1011 (1984); *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 225 (1986). In *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 490 (1987), the Court stated: " 'Although a comparison of values before and after' a regulatory action 'is relevant . . . it is by no means conclusive' " (citation omitted).



there is no evidence in the record below that this is the case. By contrast, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), the state trial court had found that the prohibition against erecting any permanent habitable structures on Lucas's parcels under the state's Beachfront Management Act (the "Act") rendered those parcels " 'valueless' " *Id.* at 1007. The Court in *Lucas* also made clear that its takings jurisprudence makes no assumption that the only uses of property cognizable under the Constitution are " '*developmental* uses,' " stating:

> We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause.

*Id.* at 1020 n.8. Moreover, this Court in *Lucas* never restricted the "property interest" involved in takings to a developmental interest. In fact, the Court acknowledged

that the "rhetorical force" of its " 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 1016 n.7. The Court observed:

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

*Id.* The Court did not need to reach this "difficult question" because the record demonstrated that the Act had left each of Lucas's beachfront lots "without economic value." *Id.*

Plainly the Court's language in *Lucas* indicates that the principal focus of regulatory takings analysis is the impact of the regulation upon *economic value*, not the loss of the opportunity to *physically* develop the property. As in *Penn Central*, the TDRs available to Mrs. Suitum could mitigate the financial burden imposed by TRPA's regulatory system and must be taken into account in considering their economic impact. However, because Mrs. Suitum never submitted an application under the transferable development rights (TDRs) program, she has made it impossible for a court to determine the extent of the economic impact of TRPA's regulatory system on her property. In *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), the Court recognized that "the finality requirement is concerned with whether the initial decisionmaker



has arrived at a definitive position on the issue that inflicts an actual, concrete injury;. . . . " *Hamilton Bank, supra*, at 193. It begs the question for a court to commence an assessment of that impact under a takings claim without the court having the evidence of a TDR application before it. In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986), the Court referred explicitly to use of an available TDR program as one means to satisfy the ripeness question.

> The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other. In *Penn Central Transportation Co. v. New York City*, for example, we recognized that *the Landmarks Preservation Commission . . . had authority in appropriate circumstances to authorize alterations, remit taxes, and transfer development rights to ensure the landmark owner a reasonable return on its property.* [citation omitted] Because the railroad had "not sought approval for the construction of a smaller structure" than its proposed 50-plus story office building, [citation omitted], we concluded "that the application of New York City's Landmark Law ha[d] not effected a 'taking' of [the railroad's] property." [citation omitted]. *Whether the inquiry asks if a regulation has "gone too far," or whether it seeks to determine if proffered compensation is "just," no answer is possible until a court knows what use, if any, may be made of the affected property.*

*Id.* at 350 (emphasis added).

### B. By Merely Filing a Building Permit Application, Mrs. Suitum Did Not Satisfy the One Application Rule Developed in *Agins*, *Hamilton Bank*, and *MacDonald*.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court held that a landowner must obtain a decision on his land use proposal from the local government before he can bring an *as applied* takings challenge. In that case, the plaintiffs had attacked the ordinance facially, as a taking, without submitting a development plan. This Court dismissed the case because the plaintiffs were "free to pursue their reasonable investment expectations by submitting a development plan to local officials." *Id.* at 262. Although the Court in *Agins* did not use the term, the decision clearly meant that a case involving a claim that an ordinance as applied to a landowner's property constitutes a taking is not ripe for a judicial decision unless the plaintiff has submitted a development plan for approval when the ordinance permits such an application.[2]

Once an application is submitted, the applicant must pursue all other required approvals related to that application to enable the decision maker to arrive at a "final,

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[2] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court held that a *facial* takings challenge, namely, a claim that a regulation on its face and in its entirety, as it applies to all property affected by it (including the landowner's), effects a taking, is not subject to the ripeness doctrine. However, it noted that plaintiffs "face an uphill battle in making a facial attack on [a regulation] as a taking." 480 U.S. at 495.



definitive position" as to the application of the regulations to the plaintiff's land. *Hamilton Bank, supra,* at 191. Mrs. Suitum's building permit application did not satisfy this requirement because the building permit could not issue under TRPA's land use regulations.

This Court again addressed the application requirement in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986). There the plaintiff had submitted one subdivision application and the county had rejected it. Nevertheless, the Court stated that it was not clear the county would not allow "some development," *id.* at 351-52, and explained that the history of the case indicated "not that future applications would be futile, but that a meaningful application had not yet been made." *Id.* at 352 n.8. In addition, the Court stated that "[r]ejection of exceedingly grandiose plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews," suggesting that *reapplication* may be necessary before a court can determine the extent of economic injury. *Id.* at 353 n.9 (emphasis added).

*Amicus curiae* believes the tension between the *Agins-MacDonald* rule that a landowner must submit one "meaningful" application and the *Hamilton Bank* rule that a landowner must utilize all available administrative relief at the local level, creates a weakness in ripeness law that many local governments have exploited to frustrate *as-applied* takings claims in federal courts. We believe the Court should resolve this tension and create a more precise and fair basis for determining when federal courts have jurisdiction in takings cases.

## II. THE COURT SHOULD RESOLVE THE TENSION BETWEEN THE *AGINS-MACDONALD* RULE, THAT A LANDOWNER MUST SUBMIT AT LEAST ONE "MEANINGFUL" APPLICATION FOR APPROVAL, AND THE *HAMILTON BANK* RULE, THAT A LANDOWNER MUST UTILIZE ALL AVAILABLE ADMINISTRATIVE RELIEF AT THE LOCAL LEVEL.

### A. Simplify the One Application Rule

The *MacDonald* Court no doubt thought that by elaborating on the *Agins* rule to say that rejection of "grandiose development" plans is not enough and that reapplication is necessary, it was adding clarification to the ripeness doctrine. However, in attempting such clarification the *MacDonald* Court ignored the realities of land use control and, consequently, created an agonizing choice for the landowner. The reality is that what is "grandiose" and what is "meaningful" within the limits of a local planning and zoning program is a matter of judgment. Because of the *Agins-MacDonald* and *Hamilton Bank* rules, the landowner whose development proposal has been denied, does not know what to do. Should the landowner "reapply" with something less ambitious, or apply for relief from the land use agency? If the landowner decides to reapply, the landowner does not know how many times to reapply – risking that a court will decide that her project is "grandiose" or that her application is not "meaningful" no matter how many times it is rejected, and require her to apply again. Neither is it clear who has the burden of proof to show that the reapplication process has been exhausted.



*Amicus curiae* submits its brief on behalf of an association of planners, many of whom work for local governments. Many other planners who belong to the association work for members of the development community. In fairness to the development community, it must be recognized that the *reapplication* requirement invites local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of the reapplication rule and is why such a rule is unrealistic and should no longer be required to demonstrate ripeness for adjudication.

*Amicus curiae* submits that, as discussed below, the determination of when "enough is enough" should not be left to the local governments to decide.[3] Rather, it should be for the landowner or developer who must weigh the risks of litigation versus another application proposal to decide whether in fact to contest the decision rendered after the first application. Unless the Court's ruling in the case *sub judice* resolves this tension between the *Agins-*

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[3] In fact, many lower federal courts have openly admitted their difficulty in determining "when enough is enough" under this aspect of the "finality" requirement. *See, e.g., Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D.Hawaii 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667 (E.D.Va. 1985).

*MacDonald* rules, that a landowner must submit a "meaningful" plan for approval, and the *Hamilton Bank* rule, that a landowner must utilize all available administrative relief at the local level, landowners will continue to be faced with an agonizing and unfair choice. Put simply, if the landowner seeks administrative relief before reapplying with a less "grandiose" project, the reapplication requirement of the ripeness rule will, in all likelihood, bar the landowner's takings claim. That surely is not the result that this Court intended under the "finality" requirement of the ripeness doctrine.

### B. The *Reapplication* Rule Is Irrelevant to Due Process and Equal Protection Claims.

In *MacDonald*, the Court stated that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 351. Many lower courts have focused upon this sentence and, where they have found a takings claim to be unripe, have dismissed substantive due process and equal protection claims as equally unripe. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994); *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.), *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988); *Ochoa Realty v. Faria*, 815 F.2d 812 (1st Cir. 1987); *Golemis v. Kirby*, 632 F. Supp. 159



(D.R.I. 1985). Other courts, however, have declined to apply the reapplication rule. *See Carroll v. City of Prattville*, 653 F. Supp. 933 (M.D. Ala. 1987); *Oberndorf v. City and County of Denver*, 900 F.2d 1434 (10th Cir.), *cert. denied*, 498 U.S. 845 (1990).

The Court of Appeals for the Ninth Circuit, following its earlier ruling in *Kinzli*, held in this case that Mrs. Suitum's substantive due process and equal protection claim were also premature under the ripeness doctrine. *Amicus Curiae* submits, however, that because substantive due process and equal protection claims challenge the *rationality* of a regulatory decision and do not require proof that a landowner's property has been rendered valueless by the regulation, these two claims do not require speculation as to what forms of less intensive development might have been permitted by the local government. This Court should clarify the confusion in the lower federal courts on this issue and rule that while the *one application* rule reasonably applies to substantive due process and equal protection claims, the *reapplication* rule is not relevant.

## III. *HAMILTON BANK* REQUIRED TAKINGS PLAINTIFFS TO APPLY FOR A VARIANCE TO MAKE THEIR TAKINGS CLAIMS RIPE, BUT THE RELATED APPROVALS NECESSARY TO MAKE A TAKINGS CASE FINAL SHOULD DEPEND ON THE TYPE OF LAND USE REGULATORY SYSTEM.

In *Hamilton Bank*, this Court held a takings case not final because the plaintiff had not applied for a variance from applicable subdivision control regulations. This

Court's emphasis on the need for a variance has confused lower federal courts that have tried to apply *Hamilton Bank*. The reason is that zoning systems usually include other forms of administrative relief besides the variance, and this Court should provide guidance on when administrative relief besides a variance is necessary.

Under the traditional Euclidean zoning system, the variance was originally conceived as a "safety valve" to give relief to a landowner while protecting the ordinance from invalidation on the constitutional ground that the particular landowner's property was burdened to a greater extent than other land in the vicinity, in violation of the due process clause.[4] The courts generally distinguish between a use variance and an area variance. The area variance fits the notion that was originally intended in the State Standard Zoning Enabling Act (SSZEA) promulgated by the U.S. Department of Commerce in 1926. It authorizes departures from ordinance restrictions on the construction or placement of buildings and other structures. In other words, the area variance allows adjustments to the requirements for yards, height, frontage, setbacks and similar dimensional aspects. A use variance quite simply permits a use that is otherwise prohibited in the particular zoning district. *See, e.g., City of Merriam v. Bd. of Zoning Appeals of the City of Merriam*, 748 P.2d 883 (Kan. 1988).

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[4] *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (invalidating a zoning ordinance on constitutional grounds as applied to a particular parcel, and articulating a balancing test weighing the public interest against the private interest).



Traditional zoning systems also usually include another form of administrative relief, known as a "conditional use" or "exception." A conditional use is a use authorized by the zoning ordinance if certain criteria are met, such as a requirement that the use be compatible with uses in the surrounding area. The conditional use is not a safety valve. It is not appropriate to require a takings plaintiff to ask for an amendment, as some federal courts require, because an amendment is a legislative, not an administrative, act. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 938 F.2d 153 (9th Cir. 1991).

There are also land use systems based on what is known as "performance" zoning. Performance zoning is a flexible zoning technique designed to permit maximum development on a site in a manner that minimizes impacts upon neighboring uses and systematically avoids the wastage of land and the destruction of natural resources.[5] Under performance zoning, each tract of land is considered unique – a function of its size, shape, and natural features. Unlike conventional zoning, which controls development by means of rigid lot size, setback, and housing regulations, performance zoning controls intensity of development with standards that set maximum density, impervious surface coverage, and minimum open space, or buffer yards. For example, in the residential land use context, performance zoning utilizes two key elements: (a) bufferyard standards that provide a range of options to a developer; and (b) housing-type options

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[5] *See generally*, L. Kendig, Performance Zoning (American Planning Association 1978).

based upon site capacity analysis. Flexible bufferyard provisions enable a developer to build at varying land use intensities on a particular site without significantly impacting neighboring land uses. Housing-type options based upon site capacity analysis free the developer of the restrictions in sizes and types of housing under conventional zoning districts and enable the developer to provide housing at various sizes and scales of units in response to a fluctuating housing market, subject to performance criteria. In this type of regulatory system, "variances" are not typically relied upon as a relief or adjustment mechanism. Rather, the municipality simply decides to give or withhold approval as part of an administrative decision making system.

It is important, therefore, that the extent to which approvals relating to an application must be pursued is assessed within the context of the particular type of land use system, whether it be based on a Euclidean zoning system, a performance zoning system, or some other type of land use control system. Transfer of development rights (TDR) is simply another form of administrative relief available in many zoning systems, including traditional and performance zoning. Transfer development rights are well recognized in many jurisdictions as an integral component of the local government's overall land use regulatory system, particularly in efforts to preserve agricultural lands and natural resource areas.[6] In New Jersey, for example, the Pinelands TDR program has made it possible to mitigate the effects of regulations

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[6] 3 Edward H. Ziegler, Jr., RATHKOPF'S THE LAW OF ZONING AND PLANNING at § 39.02[d] (1996).



enacted to preserve unique resources of the pine-oak forest and wild and scenic rivers, which include habitats for many rare, threatened and endangered plant and animal species.[7] In addition to preserving these resources, TDR regulations protect the seventeen-trillion-gallon Cohansey aquifer, believed to be one of the largest untapped sources of pure water in the world.

Many local governments have also enacted TDR programs to save open space.[8] Programs can be found in Malibu and Monteray Counties, California, and cities and towns in Florida, New Jersey, Vermont, Montana and Pennsylvania. For example, the 3,100 acre special study area in the Cross Creek region of Alachua County, Florida, with its exceptional wetlands and upland habitat areas, has been saved through the use of TDR.[9]

Another major area in which governments have put TDR to work to save critical resources while preserving property rights is landmarks preservation.[10] Private

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[7] *Mary Gardner v. New Jersey Pinelands Commission*, 125 N.J. 193, 198; 593 A.2d 251 (1991). The U.S. Congress enacted The National Parks and Recreation Act of 1978 to establish the one million acre Pinelands Natural Reserve. Pub. L. No. 95-625, § 502, 92 Stat. 3492 (codified at 16 U.S.C.A. § 471i) (1996).

[8] 3 Edward H. Ziegler, Jr., RATHKOPF'S THE LAW OF ZONING AND PLANNING at § 39.02[e] (1996).

[9] *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. Dist. Ct. App. 1st Dist. 1990), *review denied*, 570 So.2d 1304 (Fla. 1990).

[10] *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978); *Shubert Organization, Inc. v. Landmarks Preservation Comm'n*, 166 A.D.2d 115, 117-18, 570 N.Y.S.2d 504 (1st Dep't 1991), *appeal dismissed without op.*, 78 N.Y.2d 1006, 575 N.Y.S.2d 456, 580 N.E.2d 1059 (1991), *and appeal denied*, 79 N.Y.2d

property owners, developers, planners and preservationists all benefit by the use of TDR in landmarks preservation. The use of TDR today enables future generations to experience and appreciate our historic resources.

In short, over the last 30 years TDR programs to preserve critical natural resources, open space and landmarks have become important and integral components of land use planning and regulatory programs in this country.

## IV. THIS COURT SHOULD RECOGNIZE A FUTILITY EXCEPTION TO THE RIPENESS RULE AND SHOULD REQUIRE COURTS TO APPLY IT AFTER A PLAINTIFF HAS MADE ONE APPLICATION FOR A LAND USE APPROVAL OR ADMINISTRATIVE RELIEF.

This Court, of course, has recognized that a landowner is not required to use "unfair" procedures or to make "futile" applications. *Hamilton Bank, supra,* at 205-206 (Stevens, J., concurring). However, this Court seems to be unaware of the importance of exceptions to the ripeness doctrine or the impact they could ultimately have on the doctrine scope and effect. *Amicus curiae* submits that the major difficulty is that this Court sees more certainty and less discretion in the land use control process than actually exists, and views its final decision requirement as a simple requirement, easily met. Nothing

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751, 579 N.Y.S. 2d 651, 587 N.E.2d 289 (1991), *and cert. denied*, 504 U.S. 946, 112 S. Ct. 2289 (1992).



could be further from the truth in a system where judgments are qualitative and administration requires the exercise of substantial discretion.

Cases in the Ninth Circuit have developed the futility exception most fully. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988). This case held the futility rule applies after a plaintiff has made one application or an application for a variance.

It is respectfully submitted that the "futility" exception should *always* apply after one application has been made for a land use approval or administrative relief. In addition, the "one meaningful" application suggested in *MacDonald*, because it has been abused by many local governments and misinterpreted by the lower courts, should not be used to gauge whether the futility exception is satisfied. Rather, the finality requirement should be applied reasonably to recognize that a local government's position on the nature and intensity of development can be determined from factors other than repeated applications and denials. These factors should include:

1. Site feasibility studies (*i.e.*, environmental)
2. Statements of officials before and during the application process
3. Local land use policies and regulations
4. The history of zoning and other land use decisions in the community
5. The nature of surrounding land uses.

### A. Site-Specific Studies, Including Environmental Studies

Often a land use agency will reject a development because site conditions make it ineligible for approval. For example, an ordinance may allow approval of a conditional use only if services available to the site, or adequate. If a land use agency rejects a proposal because services at the site are inadequate, the applicant should be able to show that further application is futile because services are adequate yet the agency refused to give approval.

### B. Statements of Officials Before, During and After the Application Process

Local zoning officials often make statements on pending land use applications, either during a hearing or in public. These statements can demonstrate that further application is futile, once land use agency has rejected an application.

### C. Local Land Use Policies and Regulations

Often a land use agency will reject a land use application because of a local land use policy continued either in a comprehensive plan or in development regulations. Unless there is some evidence that the municipality may be willing to change the policy, further application will be futile.



### D. The History of Zoning and Other Land Use Decisions in the Community

The rejection of a plaintiff's development application may simply be part of a pattern of similar rejections in the community. For example, the application may be for low-cost housing and the applicant may be able to show the community has regularly rejected applications for such housing. Evidence of this also should be enough for a futility holding.

### E. The Nature of Surrounding Land Uses

The nature of surrounding land use is often critical to the success of a land use application, such as an application for a conditional use. If an application is rejected in this kind of case because the land use agency claims surrounding uses are incompatible, but the applicant can show they are compatible, further application will be futile and the claim should be ripe.

## V. THE COURT SHOULD ELIMINATE THE SECOND PRONG OF THE RIPENESS DOCTRINE REQUIRING THE LANDOWNER TO HAVE SOUGHT AND BEEN DENIED JUST COMPENSATION THROUGH AVAILABLE STATE PROCEDURES AND ALLOW LANDOWNERS WITH REGULATORY TAKINGS CLAIMS TO PURSUE THEIR FEDERAL REMEDY IN FEDERAL COURT.

When the Supreme Court first adopted the ripeness rules in *Hamilton Bank*, it held that one prong of the doctrine requires takings plaintiffs to seek compensation in state court if it is available. Lower federal courts have

abused this requirement. Some courts require a showing that state courts will grant a compensation remedy. *See, e.g., Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1693 (1995); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1991); *Ochoa Realty Corp. v. Faris*, 815 F.2d 812 (1st Cir. 1987). Other courts bar plaintiffs from federal court even when it is not clear a state court remedy is available. They hold a plaintiff must attempt to seek compensation in state court until the state court holds the compensation remedy is unavailable. *See, e.g., Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573 (7th Cir. 1990); *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb County Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989).

These holdings effectively drain the ripeness rules of any meaning. They prevent federal courts from ever reaching the final decision issue because, under this view, a takings plaintiff must seek compensation in state court until that court clearly says it will not entertain a compensation remedy.

Some federal courts take an even more extreme position on the availability of a state compensation remedy. They hold that takings plaintiffs must sue in state court under the implied federal constitutional action for compensation created in *First English. Tari v. Collier County*, 56 F.3d 1533, 1537 n.23 (11th Cir. 1995); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993); *Northern Va. Law School, Inc. v. City of Alexandria*, 680 F. Supp. 222 (E.D. Va. 1988). This view of ripeness even more clearly makes the ripeness rules an absolute bar to a



taking remedy. The federal constitution is always actionable in state court. If takings plaintiffs must always sue in state court first on the federal remedy, they will never establish federal court jurisdiction over a takings claim.

This problem becomes even more serious if a takings plaintiff cannot return to federal court once a state court adjudicates the takings claim. A plaintiff usually is barred from relitigating a state case in federal court under res judicata and collateral estoppel principles. An exception exists when a federal court forces a plaintiff into a state court by abstaining, but it is not clear whether it applies when ripeness rules force a plaintiff into state court. *Compare Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) (exception applies), *with Palomar Mobilehome Park Ass'n v. San Marcos*, 989 F.2d 362 (9th Cir. 1993) (*contra*).

*Amicus curiae* submits that the rule that takings plaintiffs must first sue in state court for compensation under the federal constitution is incorrect. When this Court first adopted the ripeness rules, there was no remedy for compensation in federal courts. Indeed, this Court adopted ripeness rules to avoid deciding whether a federal compensation remedy is available. In the absence of a federal compensation remedy, it perhaps made sense to require takings plaintiffs to seek a state compensation remedy first.

This situation has now changed. In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 302 (1987), this Court held that a remedy for compensation in takings cases is available under the federal constitution. Federal courts should not require

takings plaintiffs to go to state court to seek compensation before taking advantage of this federal remedy.

A Ninth Circuit panel has now held that the availability of a compensation remedy in state court under *First English* does not satisfy the requirement that a takings plaintiff must sue for compensation first in state court. *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995). The court held that federal ripeness rules require the availability of a state compensation remedy. It stated that "to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant." *Id.* at 860. The court was "satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result." *Id.* at 861.

This issue is important in *Suitum* because forcing the plaintiff to seek a remedy under *First English* in state court will make her case unripe even though she later satisfies the final decision rule. This Court should follow the holding in *Dodd* in order to make it clear that plaintiffs in as-applied takings cases can obtain a ruling in federal court on the federal takings law that this Court has developed so extensively in recent years.

## CONCLUSION

This case affords the Court an opportunity to clarify the application of the "finality" requirement of the ripeness doctrine to land use cases so that the requirement serves its intended purpose. That purpose is to encourage



the decision maker to arrive at a definitive position on the issue that is alleged to inflict an actual, concrete and justiciable injury. It is not to encourage the creation of complex, time-consuming review and approval processes that waste the resources of local government and create a climate of regulatory uncertainty that does not promote the public interest.

The Court's ruling in this case should resolve the tension between the *Agins-MacDonald* rule, that a landowner must submit a "meaningful" plan for approval, and the *Hamilton Bank* rule, that a landowner must utilize all available administrative relief at the local level. The Court's clarification and guidance on the "finality" prong of the ripeness doctrine will promote the rational, efficient and predicable and beneficial use of real property in concert with the public interest.

January 9, 1997

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## INTEREST OF AMICI CURIAE

Amici Curiae National Trust for Historic Preservation in the United States and the Municipal Art Society of New York file this brief pursuant to Supreme Court Rule 37. Counsel for the parties have consented to the filing of this brief and copies of their letters have been filed with the Clerk of the Court.

The National Trust for Historic Preservation in the United States (the National Trust) is a private nonprofit, charitable, and educational organization chartered by Congress in 1949 to further the historic preservation policy of the United States and to "facilitate public participation" in historic preservation. 16 U.S.C. §§ 461, 468. The National Trust has more than 265,000 individual members and seven regional and field offices nationwide.

Through its Legal Defense Fund, the National Trust advocates to secure judicial, administrative, and legislative decisions that uphold the validity and effectiveness of regulatory protections for historic properties and land-use regulations in general. The National Trust has a particular interest in the protection of transfer of development rights programs, as they are employed by a number of local, regional, and state governments for the protection of historic properties, scenic areas, and farmlands. The National Trust has participated in more than 100 federal and state court cases over the past quarter century, including as amicus curiae in nine regulatory taking cases before this Court.

The Municipal Art Society of New York (the Society) is a 103-year old civic organization that aggressively champions excellence in urban design and planning, and preservation of the best of New York City's past. Its educational and advocacy efforts are dedicated to making New York a more livable city. The Society has been concerned with land-use issues in New

York City for over ninety years and was a proponent of the City's first zoning law, enacted in 1916, and the Planning Commission, created in 1938. For four decades, the Society has been at the forefront of the historic preservation movement in New York City and was a major advocate for the creation of the Landmarks Preservation Law in 1965. As a leading proponent of the efforts to save Grand Central Terminal, the Society has a particular interest in the transfer of development rights in connection with the preservation of historic properties. The Society followed the legal battle from the trial courts to the final decisions in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The Society often participates in legal cases to advocate thoughtful and careful approaches to the planning and preservation of the urban environment.

The City and County of San Francisco (San Francisco) is a municipal corporation chartered under the laws of the State of California. San Francisco regulates the use of land throughout the City. As part of its land use regulation, San Francisco imposes special conditions and regulations on buildings, structures and other objects to preserve their special architectural, historical or aesthetic value.

San Francisco offers an economic incentive to property owners to encourage preservation of historically or architecturally significant buildings by allowing the owners to transfer their development rights to another lot. San Francisco Planning Code § 128. San Francisco has a vital interest in protecting its transferable development rights program in order to preserve historical or architecturally significant buildings. Such preservation is one of eight priority land use policies adopted by the voters of San Francisco in 1986. *Id.* § 101.1.



## STATEMENT OF THE CASE

Amici Curiae adopt Respondent Tahoe Regional Planning Agency's statement of the case.

## ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the decision of the United States District Court for the District of Nevada granting summary judgment to Respondent Tahoe Regional Planning Agency, on the grounds that the regulatory taking claim brought by Petitioner Mrs. Bernadine Suitum was not ripe for judicial review.

Petitioner's claim is not ripe for adjudication because she has failed to apply to the Tahoe Regional Planning Agency (TRPA) to transfer her development rights to another parcel of land. This mechanism for the transfer of development rights (TDR) is an integral part of TRPA's land-use regulatory program and provides Petitioner with constitutionally sufficient use of her property. Application for such a transfer is necessary in order to evaluate the economic impact of the regulation on her property, and is thus a prerequisite to judicial review of her taking claim. Nor has Petitioner shown that an application to transfer her development rights would be futile. In fact, nationwide experience with TDR programs, as documented below, confirms that they are a well-established mechanism for enhancing the value of property subject to regulatory restrictions.

## I. PETITIONER'S CLAIM IS NOT RIPE BECAUSE SHE HAS FAILED TO APPLY TO TRPA TO TRANSFER HER DEVELOPMENT RIGHTS, AND THUS THE COURT LACKS AN ADEQUATE BASIS TO EVALUATE THE ECONOMIC IMPACT OF THE LAND-USE RESTRICTIONS ON HER PROPERTY.

This Court has repeatedly found that a regulatory taking claim is not ripe for adjudication unless the property owner has filed "a meaningful application" with the appropriate government regulatory agency, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986), and the agency "has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348.

Indeed, this Court has been unwavering in its determination to require an application for regulatory permission, and a decision on that application, before a regulatory taking claim will be considered ripe for judicial review. *Williamson County*, 473 U.S. at 186; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Without an application, it is impossible for the reviewing court to determine whether the property owner "'will



be unable to derive economic benefit' from the land." *Williamson County*, 473 U.S. at 191 (footnote omitted).[1]

As this Court explained in *Williamson County*, the economic impact of a regulation, and the extent to which it interferes with distinct investment-backed expectations, "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* In *Agins*, this Court similarly concluded that the property owners' as-applied taking claim in that case was unripe, because they had not submitted a plan "as the ordinances permit." *Agins*, 447 U.S. at 260.

The current posture of this case presents the same problem. TRPA's regulations clearly set forth a land-use regulatory application procedure for the transfer of development rights, and Petitioner has chosen not to apply for a transfer prior to bringing a regulatory taking claim in court. As explained below, these regulations, once employed, would provide an adequate basis to evaluate the economic impact on Petitioner's property.

TRPA's regulations create a two-part system that sets out the procedures and requirements for property owners undergoing regulatory review for the use of their property. First, TRPA evaluates the environmental capacity of each

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[1] The application requirement will not be satisfied if a landowner who alleges a taking has made no effort or merely a token effort to apply. *See* R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from* Hamilton Bank *to* Lucas, 9 J. LAND USE & ENVTL. L. 101, 115-18 (1994) (summarizing lower court treatment of this Court's ripeness doctrine).

individual parcel of land to accommodate development, and makes an individualized determination of each parcel's suitability for development.

The second part of TRPA's regulatory program is the TDR provision. TRPA allows—indeed, it facilitates—the transfer of development rights from unbuildable "sending" parcels to other, buildable "receiving" parcels, where those development rights may be employed to increase the size and/or density of development. The TDR program allows the transfer of each type of development right that property owners must possess in order to develop land within TRPA's jurisdiction, including (1) land coverage potential; (2) residential development rights; and (3) residential allocations. TRPA has routinely approved transfers of the three types of development rights since its TDR program was initiated in 1987. Joint Appendix (App.) at 99 (Barnett Affid. ¶ 12).

Each type of development right has a specific transfer mechanism, reflecting its purpose and underlying policies. First, land coverage potential may be transferred from one parcel to another parcel located elsewhere within the same hydrologic area. TRPA Code of Ordinances (TRPA Code), ch. 20. Petitioner's hydrologic area, one of nine within the Lake Tahoe Basin, includes 14,106 acres. App. at 96 (Barnett Affid. ¶ 5). She is thus eligible to transfer her land coverage potential (183 square feet, or the size of a large room addition) to any parcel within this area, for construction of a correspondingly larger project on the receiving parcel. App. at 96 (Barnett Affid. ¶ 6). Petitioner never applied to TRPA to transfer her land coverage potential. Suitum Dep. at 119-20.

Second, residential development rights may be transferred to certain parcels of land within the Lake Tahoe Basin. TRPA



Code, ch. 21. Petitioner possesses one residential development right, which she may apply to transfer to other parcels, subject to county approval and use and density eligibility of the receiving parcel. App. at 97 (Barnett Affid. ¶ 8). Not only are a wide range of parcels eligible to receive such residential development rights, but certain types of development, such as multi-residential projects, can be built only if the developer has acquired residential development rights from other parcels. *Id.* Petitioner never applied to TRPA to transfer her residential development right. Suitum Dep. at 119.

TRPA also grants "multi-residential bonus units" to projects acquiring transferred residential development rights from ecologically sensitive parcels such as Petitioner's. TRPA Code, ch. 35. Because Petitioner's parcel is located in a Stream Environment Zone, three multi-residential bonus units would be available for a project acquiring Petitioner's residential development right through a transfer. App. at 98 (Barnett Affid. ¶ 9).

Third, residential allocations may be transferred from parcels unsuitable for development to any parcel in the Lake Tahoe Basin that can accommodate development, subject to county approval and use and density eligibility of the receiving parcel. TRPA Code, ch. 34. Petitioner obtained a residential allocation in 1989, but she allowed it to lapse. App. at 146 (Scholley Affid. ¶ 8). She remains eligible to receive another residential allocation simply by applying to TRPA. *Id.* The fact that her parcel is environmentally unsuitable for development does not affect her eligibility for a residential allocation. *Id.* Indeed, TRPA has traditionally reserved ten percent of the residential allocations available each year for parcels such as Petitioner's that cannot accommodate development themselves. *Id.* Petitioner has not applied for another residential allocation

since originally being awarded one in 1989, nor did she ever apply to TRPA to transfer the residential allocation she previously possessed. *Id.;* Suitum Dep. at 119.

In ignoring all three of these options for transferring her development rights, Petitioner has likewise ignored this Court's unambiguous constitutional command that owners must ripen their cases before seeking judicial review. The Court must not be put in the position of speculating as to what will happen if and when she applies to transfer her development rights. It is just this sort of guess-work that the ripeness doctrine is designed to preclude. Petitioner should be required to apply for a transfer of her development rights prior to seeking review of her regulatory taking claim.

## II. IT WOULD NOT BE FUTILE FOR PETITIONER TO APPLY TO TRANSFER HER DEVELOPMENT RIGHTS, AS SUCH AN APPLICATION WOULD ALLOW HER TO ENJOY A CONSTITUTIONALLY SUFFICIENT USE OF HER PROPERTY.

Petitioner attempts to justify her failure to apply for transfer of her development rights by suggesting that it would be futile to do so. This Court has indicated, however, that "futility" will be found only in extremely limited circumstances. *See MacDonald,* 477 U.S. at 348-49, 352 n.8; *Williamson County,* 473 U.S. at 186; *Agins,* 447 U.S. at 260; *see generally* Lyman, *supra,* at 122-24.

Petitioner's futility argument is based on her denunciation of the entire TDR program as a "contrivance." Petitioner's Brief at 5. This argument completely disregards the many transfers that have occurred since the program was initiated in



1987. App. at 99 (Barnett Affid. ¶ 12). Moreover, it is equally important to recognize that the TDR program administered by TRPA is not, in fact, unique. As discussed in more detail below, TDRs are employed nationwide in land-use regulations to provide additional and valuable uses to regulated property.

### A. Nationwide Experience With TDR Programs Demonstrates That TDRs Are Marketable and Provide a Constitutionally Sufficient Use of Property.

TRPA's program for allowing transfers of different types of development rights has many features in common with other TDR programs adopted by state, regional, and local jurisdictions across the country to protect ecologically sensitive lands and historically significant buildings, while enhancing the value of property subject to restrictions.

Relying on the well-established notion of property as a collection of rights, TDR programs recognize the ability to use one's property for development purposes as a right capable of being severed from a particular parcel and thereafter sold for use on another parcel. *See West Montgomery County Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n,* 309 Md. 183, 522 A.2d 1328, 1330 (1987). The sale of these development rights permits property owners to realize value from rights that are otherwise restricted when it comes to use of the initial owner's property. The TDR process is commenced—and a transfer is possible—only when a property owner files an application. *See Carpenter v. Tahoe Regional Planning Agency,* 804 F. Supp. 1316, 1325 (D. Nev. 1992); *Glisson v. Alachua County,* 558 So. 2d 1030 (Fla. App. 1990).

In order to facilitate markets for development rights, local governments have typically established two administrative mechanisms. *See* Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States,* 19 B.C. ENVTL. AFF. L. REV. 565, 574-77 (1992). A two-party private transaction mechanism permits the owner of a designated sending parcel to sell its transferable development rights directly (or with the assistance of a broker) to the owner of an eligible receiving parcel. A bank-based transaction mechanism enables a governmental agency or nonprofit organization to purchase development rights from the owners of sending parcels and to bank them for later sale to third parties. *See Matlack v. Board of Chosen Freeholders*, 191 N.J. Super. 236, 466 A.2d 83 (1982), *aff'd*, 194 N.J. Super. 359, 476 A.2d 1262 (App. Div. 1984) (upholding county authority to purchase development rights).

It is also common to find a hybrid of these two mechanisms under which a bank exists as a purchaser of last resort, while private transactions normally constitute the development rights market. *See Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 593 A.2d 251 (1991). The principal market-making issue under any system is ensuring that there is sufficient demand for development rights from the owners of receiving parcels, a bank, or others, to absorb the supply that sending parcel owners may wish to transfer. *See American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981); *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. App. 1990); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal. Rptr. 191 (1982).

Local governments adopt TDR programs after carefully addressing a number of other administrative and policy issues.



*See* Kayden, *supra.* at p. 10, 574-77. They must define the type of parcel from which development rights will be sent, either categorically (e.g., every farmland parcel of a size exceeding a certain number of acres, or every parcel containing an historic structure, as defined by specific criteria) or geographically (e.g., every parcel within a particular designated district). *See City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. App. 1983). Local governments must also identify parcels that may receive development rights, either on a parcel-by-parcel basis or within specifically delineated receiving districts. Local governments have handled these matters in various ways, with some limiting transfers so that they may only take place between contiguous parcels, some delineating areas within which transfers may freely occur, and some allowing transfers anywhere within their jurisdiction between appropriately characterized sending and receiving parcels.

The purposes for which TDRs have been employed are as wide ranging as the purposes of land-use regulation generally. The historic landmark preservation focus of New York City's program is already known to this Court. Farmland preservation motivated Montgomery County, Maryland. The Pinelands Commission in New Jersey and Suffolk County on New York's Long Island each adopted TDR programs to protect open space and wetlands.

It may prove instructive to this Court's consideration of this case, and the role of TRPA's TDR program, to have a brief synopsis of three well-known, and distinct, TDR programs. The most prominent TDR program (not least because of this Court's opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)) exists in New York City, where it is designed to enhance protection of designated historic landmarks. The program operates under the City's zoning

ordinance, which generally allows transfers from parcels containing designated historic landmarks to "adjacent" parcels, including parcels that are contiguous, across the street, or, where there is a common chain of title, connected through intervening streets. N.Y. City Zoning Resolution § 74-79.

The amount allowed to be transferred under this provision is the difference between the maximum allowable floor area for the sending parcel under existing zoning, and the built floor area of the existing zoning lot, including the landmarked structure. The amount allowed to be utilized on the receiving parcel is not capped within the central business districts—where Grand Central Terminal and numerous other landmarks are located—but is limited elsewhere to an increase of no more than twenty percent above the otherwise maximum allowable floor area of the proposed new development. The City Planning Commission also reviews each proposed transfer to ensure that the landmark on the sending parcel will be preserved after the transfer and that there will be no land-use planning problems created on or near the receiving parcel as a result of the transfer. In addition, a number of other TDR provisions also apply to New York City's historic landmarks. *See* Brief of Amicus Curiae City of New York.

In San Francisco, TDRs have been successfully used in the city's downtown area to increase the allowable density of development beyond that otherwise permitted by San Francisco's planning law. TDRs may be transferred from a lot containing a building which San Francisco has designated significant or a landmark (a Transfer Lot). San Francisco Planning Code § 128(a). Similar to New York City's TDR program, the amount of TDRs available for transfer consists of the difference between the allowable gross floor area of the existing structures on the Transfer Lot. *Id.* § 128(b).



San Francisco's TDRs may be transferred to another lot located in the downtown zoning district, *id.* § 128(c), either as a group to a single transferee or in separate increments to multiple transferees. *Id.* § 128(g). TDRs may be transferred directly to the owner of the lot to be developed. *Id.* Once the owner has purchased TDRs, the gross floor area of the structure to be constructed on that lot increases by the amount of TDRs transferred. *Id.* § 128(a).

Another well-known TDR program that has a successful track record of transfers exists in New Jersey's Pine Barrens. Covering the entire million-acre area under the jurisdiction of the Pinelands Commission, this TDR program is designed to protect forested and agricultural areas while concentrating growth in areas served by adequate infrastructure and otherwise capable of handling new development. The Pinelands Comprehensive Management Plan establishes land-use districts across the entire jurisdiction, including agricultural production areas, forest areas, preservation areas, rural development areas, regional growth areas, and villages and towns, among others. N.J. Stat. Ann. §§ 13:18A-1 to -29. Within certain areas, including villages, towns and growth areas, almost all types of development are allowed, while preservation and agricultural areas are more restricted. The TDR program allocates development rights within these restricted areas, with each development right allowing construction of up to four new houses in regional growth areas. There is also a bank which administers the program by keeping records, issuing the relevant documentation, tracking actual transfers, providing useful information to prospective purchasers or sellers of development rights, and periodically purchasing such rights itself. *See Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 593 A.2d 251 (1991).

The New York City and San Francisco TDR programs for historic preservation and the New Jersey Pinelands TDR program for protection of environmentally sensitive land are three of many TDR programs employed successfully across the country in land-use regulatory programs. The following table describes the location, purpose, and levels of activity of a cross-section of TDR programs employed over the past twenty years throughout the United States.

**Table 1: Nationwide Examples of Operating Transfer of Development Rights Programs**

| Location | Purpose | Transfer Activity/ Comments | Source |
|---|---|---|---|
| Belmont, California | Reduce or eliminate development on steep slopes | Six transfers as of 1993 | note 1 |
| Burbank, California | Promote appropriate concentration while maintaining overall development capacity within limits of transportation and public service systems | Two transfers involving over 400,000 square feet | note 2 |



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|---|---|---|---|
| Cupertino, California | Create flexible density limitations to assist operation of Traffic Intensity Performance Standard regulation | Between 30 and 40 transfers; very few development rights are left to be transferred | note 3 |
| Los Angeles, California | Preserve historic structures, promote housing, improve transportation, and protect open space | Three projects approved involving one million square feet of office, hotel, and retail floor area; developers pay $35 per square foot of floor area transferred | note 4 |
| Monterey Co., California | Protect view corridors and Big Sur | Transfers involve about 20 acres | note 5 |
| Morgan Hill, California | Preserve hillside land | 67 transfer credits have been purchased, involving 108.5 acres of hillside land; transfer credits sell for about $75,000 each | note 6 |
| Oxnard, California | Control beachfront development | Transfers occurred between 1984 and 1988 | note 7 |

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| Pacifica, California | Site-specific | One transfer involving 20 acres | note 8 |
| Pismo Beach, California | Preserve open space | Preserve public access to beach | note 9 |
| Placer Co., California | Preserve open space | Provides economic value to property owners affected by a 300-foot setback requirement | note 10 |
| Roseville, California | Limit density of development | Transfer rights between parcels owned by developer wanting to build a subdivision | note 11 |
| San Diego, California | Preserve historic structures | At least two transfers involving 5 to 10 residential units | note 12 |
| San Francisco, California | Preserve historic structures | Ten transfers; successful because TDR is central mechanism for exceeding San Francisco's downtown density limit | note 13 |
| San Luis Obispo Co., California | Reduce development along highly erodible coastal areas and to protect critical habitats | About 200 transfers | note 14 |



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|---|---|---|---|
| San Mateo Co., California | Preserve farmland and agricultural activity | Two bonus density credits have been transferred | note 15 |
| Santa Monica Mountains California | Reduce potential landslide and fire hazards, minimize impacts on public service systems and avoid environmental degradation | Over 500 transfers; prices vary according to demand; in the early 1980's, a TDC was priced at $43,000, and a low of $15,000 per TDC was reached in the mid-80's | note 16 |
| Irvine, California | Encourage residential development | One transfer involving 400 unit residential complex; ordinance designed with a specific project in mind | note 17 |
| Pasadena, California | Preserve historic properties | Three transfers; other methods can also be used to increase density | note 18 |
| Boulder, Colorado | Preserve farmland | Received 1996 award under state "Smartgrowth" program | note 19 |
| Douglas Co., Colorado | Preserve open space | Received 1996 award under state "Smartgrowth" program | note 20 |

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|---|---|---|---|
| Washington, D.C. | Protect historic buildings | Transfers protect old downtown, permit increased height for new development | note 21 |
| Collier Co., Florida | Preserve environmentally sensitive land | 325 acres preserved | note 22 |
| Maitland, Florida | Preserve open space | One transfer involving 3.5 acres at $35,000 value | note 23 |
| Palm Beach Co., Florida | Preserve environmentally sensitive land | One major transfer since 1992, valued at $1.2 million; other credits would allow 6,400 additional homes. | note 24 |
| Calvert Co., Maryland | Preserve farmland | Used to counteract urban sprawl | note 25 |
| Charles Co., Maryland | Preserve farmland | Used by six developers; approved in 1992. | note 26 |
| Montgomery County, Maryland | Preserve farmland | Development rights for about 40% of the county's 91,000 rural acres have been sold; the 1981 plan gives 1 TDR for every 5 rural acres; permits an extra unit beyond base zoning | note 27 |



| | | | |
|---|---|---|---|
| Queen Anne's County, Maryland | Preserve farmland | In active use | note 28 |
| St. Mary's County, Maryland | Preserve farmland | Approved in 1990 | note 29 |
| Burlington Co., New Jersey | Preserve farmland | Pilot program passed by legislature | note 30 |
| Pinelands, New Jersey | Preserve environmentally sensitive land | Transfers involving 12,318 acres | note 31 |
| New Jersey | Preserve open space | Municipal Land Use Act permits offsite clustering of noncontiguous parcels in common ownership/control | note 32 |
| New York City | Preserve historic landmarks | About a dozen transfers | note 33 |
| Suffolk Co. (Pine Barrens), New York | Preserve environmentally sensitive land | Transfers involving 8.5 acres, with 158 credits issued to 121 parcels | note 34 |
| Westchester Co., New York | Preserve 127-year old church | Transfer involving 100,000 square feet, at a value of $3.7 million; developer bought air rights from Grace Episcopal Church | note 35 |

| | | | |
|---|---|---|---|
| Lancaster Co., Pennsylvania | Preserve farmland | Four TDRs transferred, each costing $5,500; developer expects to buy as many as 50 TDRs to complete project | note 36 |
| Pittsburgh Pennsylvania | Protect historic buildings and arts facilities | Development rights purchased and transferred from two theaters | note 37 |
| Austin, Texas | Riverfront preservation | Used in revitalization of Austin's Colorado River promenade | note 38 |
| Blacksburg, Virginia | Preserve open space, farmland, and forest | Adopted in 1996 to protect Tom's Creek Basin | note 39 |
| Pierce Co., Washington | Preserve farmland | Covers 1,800 acres of farmland | note 40 |
| Seattle, Washington | Preserve historic theaters | At least three transfers for Hyatt Regency project involving 130,012 square feet; developer paid $1.47 million to be used for city's affordable housing fund | note 41 |



| | | | |
|---|---|---|---|
| Portland, Oregon | Preserve & maintain single-room occupancy housing | Adopted in 1988 as part of Central City Plan | note 42 |

**Footnotes to Table:**

1. RICK PRUETZ, PUTTING TRANSFER OF DEVELOPMENT RIGHTS TO WORK IN CALIFORNIA 59-60 (Solano Press 1993).
2. *Id.* at 77-78.
3. *Id.* at 75-77.
4. *Id.* at 67-69.
5. *Id.* at 46-47.
6. *Id.* at 58-59.
7. *Id.* at 47-49.
8. *Id.* at 49-50.
9. *Id.* at 50-51.
10. *Sacramento Bee*, Oct. 10, 1996, at N1.
11. *Id.*, April 21, 1996, at N3.
12. PRUETZ, *supra* n.1, at 71-72.
13. *Id.* at 66-67.
14. *Id.* at 56-57.
15. *Id.* at 73-74.
16. *Id.* at 53-55.
17. *Id.* at 79-80.
18. *Id.* at 69-71.
19. *The Denver Post*, July 28, 1996, at D4.
20. *Id.*
21. *Washington Post*, Aug. 3, 1996, at C1.
22. PRUETZ, *supra* n.1.
23. *Orlando Business Journal*, Oct. 4, 1996, at 32.
24. *Palm Beach Post*, Aug. 28, 1996, at 4B.
25. *Washington Post*, March 25, 1995, at E1.
26. *Warfields Business Record*, Sept. 16, 1996, at 1.
27. *Washington Post*, Nov. 16, 1996, at E1; *Warfields Business Record*, Sept. 16, 1996, at 1.
28. *The Capital*, Sept. 18, 1996, at A10.
29. *Warfields Business Record*, Sept. 16, 1996, at 1.

30. *New York Times*, Feb. 18, 1996, sec. 9, at 11; AMANDA GOTTSEGEN, PLANNING FOR TRANSFER OF DEVELOPMENT RIGHTS: A HANDBOOK FOR NEW JERSEY MUNICIPALITIES 159 (Burlington Co. Freeholders 1992)
31. *New York Times*, Feb. 18, 1996, sec. 9, at 11.
32. *Id.; New Jersey Lawyer*, July 29, 1996.
33. RICHARD RODDEWIG & CHERYL INGHRAM, TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS 8 (American Planning Ass'n 1987).
34. *Newsday*, March 27, 1996, at A28; *Id.*, April 20, 1996, at A19.
35. *New York Times*, July 8, 1990, sec. 10, at 15.
36. *Intelligencer Journal*, Oct. 31, 1995, at B1.
37. TERRY J. LASSAR, CARROTS AND STICKS: NEW ZONING DOWNTOWN 185 (Urban Land Inst. 1989).
38. *Asbury Park Press*, July 21, 1996, at C3.
39. *Roanoke Times & World News*, Nov. 14, 1996, at NRV12.
40. *News Tribune*, Nov. 7, 1996, at B3.
41. *Seattle Times*, Jan. 5, 1993, at B1; *Id.*, Oct. 1, 1996, at B2; LASSAR, *supra* n.37, at 186-87.
42. *Id.* at 185-86.

In short, TDR programs are widely established nationwide, and have proven effective in managing development in sensitive areas.

### B. This Court Has Expressly Accepted the Role of TDR Programs in Determining Whether Private Property Retains a Constitutionally Sufficient Use.

Perhaps in recognition of the fact that TRPA's TDR program would provide a means through which she could realize economic value for her property, Petitioner resorts to the extreme—and constitutionally unsustainable—position that "use" (by which she appears to mean residential development geographically located only on her parcel) and "value" (by which she appears to mean, *inter alia*, what she might receive from the sale of her TDRs) are somehow distinct. Petitioner's



Brief at 12-15, 30-34. This Court's landmark *Penn Central* case unequivocally contradicts Petitioner's assertions, making clear that the ability to transfer development rights constitutes a "use" of property within the meaning of this Court's precedents, a use that Petitioner has chosen to disdain. In *Penn Central,* this Court expressly concluded that:

> Appellants . . . exaggerate the effect of the [New York City landmarks] law on their ability to make use of the air rights above the Terminal . . . . [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* **use** of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.

*Penn Central Transportation Co. v. New York City*, 438 U.S. at 136-37 (footnote omitted; emphasis in original and added).

In addition, the Court stated that the ability to transfer such rights must be taken into account in order to determine whether a taking has occurred at all:

> Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial

> burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

*Id.* at 137 (footnote omitted). It is axiomatic that the Court in *Penn Central* would not have specifically relied on New York City's TDR provision, and the economic value that such transfers would bring to the property owner, if the availability of development rights transfers was meaningless to a determination of whether a regulatory action effected a taking.

This Court's opinion in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), is similarly supportive. There, the trial court found that the actions of the state's regulatory agency had rendered the owner's property valueless, i.e., worth zero dollars, and this Court expressly decided the case "under the same factual assumption[]." *Id.* at 1020 n.9. There is no such factual finding in this case.

The *Lucas* opinion used a variety of formulations to describe the circumstances under which a categorical "total taking" might occur, triggering the obligation to compensate, absent a nuisance or property law-based exception. *Id.* at 1029-30. This Court variously described the categorical taking standard as a denial of "all economically beneficial or productive use" of land, *id.* at 1015; all "economically viable" use, *id.* at 1016; "all economically feasible use," *id.* at 1016 n.7, and "all economically valuable use," *id.* at 1028. Yet the Court repeatedly emphasized the word "economic," and explicitly recognized when framing its analysis: "For what is the land but the profits thereof?" *Id.* at 1017 (quoting 1 E.COKE, INSTITUTES ch. 1, § 1 (1st Am. ed. 1812)). If the state of South Carolina had offered a TDR option that provided Lucas with some economic



use of his property, then he would not have been able to prove a categorical total taking.

Petitioner's argument—that the Constitution demands that her development rights be exercised in a geographically specific fashion on her parcel of land—yields the bizarre result that, even if the transfer of her development rights would yield hundreds of thousands of dollars, an amount potentially worth more than the parcel itself, TRPA's action would still effect a taking. In fact, the evidence in the record suggests that her development rights—and her restricted parcel itself—may have substantial value.

For example, in addition to any residual value of Petitioner's parcel, which could be realized through sale to adjacent owners for purposes of open space, view protection, or privacy, each of her development rights appears to have value in the marketplace for TDRs in the Lake Tahoe Basin. Those rights are valued at between $10,000 and $51,500, including approximately $30,000 for the residential allocation right. *See generally* App. at 130-32 (Johnson Affid.). These numbers are, of course, not precise, which only serves to emphasize that Petitioner's case is not ripe, but they confirm that there is substantial value to be realized from her property. Furthermore, the record shows that the State of Nevada recently offered to purchase Petitioner's parcel for $35,000 under a program (which continues to have available funds) to buy ecologically sensitive lands. *See* App. at 141 (Johnson Suppl. Affid. ¶ 12).

## III. EVEN IF IT WERE RIPE, PETITIONER'S TAKING CLAIM WOULD FAIL UNDER THIS COURT'S PRECEDENTS BECAUSE SHE HAS FAILED TO SATISFY THE CONSTITUTIONALLY REQUIRED STANDARDS.

Petitioner cannot succeed on the merits of her regulatory takings claim even if it is deemed to be ripe. Absent a *Lucas*-type "total taking," a physical occupation, or a finding that a regulatory action does not substantially advance legitimate state interests, this Court's inquiry to determine whether a regulation has effected a taking consists of three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124; *see* Jerold S. Kayden, *Hunting for Quarks: Constitutional Takings, Property Rights, and Government Regulation*, 50 WASH. U. J. URB. & CONTEMP. L. 125, 133-35 (1996). The inquiry focuses on whether the property owner can earn a "reasonable return" on its use of "the parcel as a whole." *Penn Central*, 438 U.S. at 129-31.

The record below fails to establish that TRPA's restrictions violate the *Lucas* categorical total taking test, the *Penn Central* three-factor inquiry, or that there is a physical occupation or failure to substantially advance legitimate state interests.



## CONCLUSION

Amici Curiae National Trust for Historic Preservation, the Municipal Art Society, and the City and County of San Francisco respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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BERNADINE SUITUM,

*Petitioner,*

*v.*

TAHOE REGIONAL PLANNING AGENCY,

*Respondent,*

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**On Writ of Certiorari to The Ninth Circuit Court of Appeals**

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## BRIEF OF SOUTHEASTERN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

---

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**On Writ of Certiorari to The Ninth Circuit Court of Appeals**

## INTEREST OF THE AMICUS

The Southeastern Legal Foundation, Inc. ("Foundation") submits its brief as *amicus curiae* in this case. The Foundation previously submitted a Motion for Leave to File as *amicus curiae* on Petitioner's Petition for Writ of Certiorari, and said motion was granted in the instant case.

The Foundation is a non-profit public interest law firm which advocates limited government, private property rights, and the free enterprise system. The Foundation's function is to engage in litigation

in support of these principles, and to oppose government abuse of authority at all levels. In the course of carrying out this mission, the Foundation provides direct legal representation to parties in civil litigation, and files *amicus curiae* briefs in selected cases, where important public policy issues are presented. The Foundation appeared as counsel of record in this Court for the petitioner in *Northeastern Florida Association of General Contractors v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297 (1993), and has appeared as *amicus curiae* in numerous cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), and most recently in the instant case on petition for writ of certiorari, which was granted by this Court.

As an advocate for individual economic liberty and private property rights, the Foundation presents the views of its supporters who believe that such individual rights should be protected against undue government intrusion. The Foundation believes that the decision of the United States Court of Appeals for the Ninth Circuit in this case constitutes a failure to protect the rights of individuals who own private property and represents a departure from this Court's precedent as enunciated in *Lucas*. The Foundation believes this case provides an opportunity to further define the distinction between "economically viable use" and "value" in the analysis of categorical takings under *Lucas*, but more importantly, this case presents the Court with a clear opportunity to reaffirm the fundamental liberty interests of individuals against the discretionary caprice of government power.



## STATEMENT OF THE CASE

*Amicus* Foundation adopts the statement of the case contained in the brief of Petitioner.

## SUMMARY OF THE ARGUMENT

The Tahoe Regional Planning Agency's (TRPA) denial of all practical, probable or even potential use and enjoyment of Mrs. Suitum's parcel of land violates this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), in which this Court held that *per se* regulatory denial of all economically viable use of private property constitutes a compensable confiscation of private property under the fifth amendment to the Constitution of the United States.

Furthermore, the TRPA scheme for granting so-called "transferable development rights," which may be sold for value only upon TRPA approval and may be utilized by a purchaser only in a fashion approved by the TRPA, constitutes a fundamental violation of the constitutionally protected "bundle of rights" that inhere in individuals who own property and that have been recognized by this Court throughout the history of American jurisprudence.

## ARGUMENT

### I

### THIS COURT SHOULD AFFIRM THE *LUCAS* PER SE TAKINGS RULE RECOGNIZING NONECONOMIC INTERESTS AS WELL AS ECONOMIC VIABILITY AS MEASURES OF VALUE OF PRIVATE PROPERTY OWNERSHIP, WHICH ARE PROTECTED AS CIVIL RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES

Mrs. Bernadine Suitum and her late husband purchased a parcel of land in Incline Village, Nevada in 1972 for the simple purpose for which the property had always been appropriate, for which real property throughout time has been employed and, in fact, for which lots in the residential subdivision in which the parcel is located have been used and developed for decades. Put simply, the Suitums planned nothing more than to build a home on their parcel of land.

After declaring the Suitums property a "Stream Environment Zone," the Tahoe Regional Planning Agency ("TRPA") determined in 1989 that the Suitums cannot develop the parcel and that, in fact, no developmental disturbance is allowed on the parcel by TRPA policy. On its face, such a denial of all economically beneficial or productive use of private property by an individual owner is a compensable



confiscation for purposes of the fifth amendment to the Constitution of the United States, as enunciated by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893 (1992).

In a scheme that turns an individual's constitutionally protected right to own and enjoy property on its ear, the TRPA has taken the further step of attempting to circumvent the Takings Clause of the fifth amendment by conjuring for an undetermined economic value certain "transferable development rights," or TDRs, which may be sold for economic value only upon TRPA approval and which may be utilized by a purchaser only in a fashion approved by the TRPA. In force and effect, the TRPA plan has transformed the fundamental civil right of property ownership and enjoyment into a conditional privilege subject to the arbitrary discretion of a government agency.

This Court's ruling in *Lucas* sets forth the justification for the rule that the fifth amendment is violated when land-use regulation "denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980). According to this Court's ruling in *Lucas*, regulations which deny economically beneficial or productive uses of land to an owner "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018, 112 S.Ct. at 2895.

In the instant case, the TRPA's regulatory denial of economically beneficial or productive uses of the Suitum's parcel of land begs the scrutiny of this Court precisely because the TRPA regulatory

scheme demands that the Suitum's land remain idle in the name of a discretionary determination of environmental conservation. This Court found in *Lucas* that "when the owner of real property is called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, *to leave his property economically idle*, he has suffered a taking." *Id.*, at 1019, 112 S.Ct. at 2895 (emphasis added).

Furthermore, the TRPA plan ignores utterly the important recognition by this Court that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause." *Id.*, at 1019, 112 S.Ct. at 2895, n. 8. See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S.Ct. 3164, 3176 (1982) (right to exclude strangers from one's land); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 181, 100 S.Ct. 383, 393 (1979) (expectancies arise from government action regarding the exercise of property ownership that, if sufficiently important, will compel the government to condemn and pay for the land in question). This Court in *Loretto* said bluntly, "The government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439, 102 S.Ct. at 3178. In even more strident language, this Court has held that, "A state, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 452 (1980).

Therefore, the *value* of the Suitum's parcel of land in the instant case, assessed in the critical context of both economic development and noneconomic inherent interests, cannot be measured adequately by a formulaic dispensation of a so-called "right to sell" mere



fractions of development interests in the land (the so-called TDRs) that are dependent entirely on the TRPA's approval of the use of said right by a third-party purchaser.

The "economically viable use" doctrine applied by this Court in *Lucas*, which contemplates beneficial and productive use of land as well as the distinct investment-backed expectations of enjoyment of land, eschews the systematic allocation and perpetual governance of TDRs as enforced by the TRPA for the very reason that such regulation changes the terms of the equation for what justifies the taking of private property. This Court recognized that "when this governmental right of appropriation -- this asserted paramount right -- is exercised it shall be attended by compensation." *U.S. v. Lynah*, 188 U.S. 445, 465 (1903). The only constitutionally permissible way in which to justify a taking of real property without compensation is to deny that what a person holds is, in fact, property. See, *e.g.*, *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 452 (1980).

In the instant case, there can be no doubt that what Mrs. Suitum holds is private property. The TRPA has taken away Mrs. Suitum's right to use and enjoy her land and transferred those rights, at least in part, to an as yet undetermined third-party purchaser, as long as that purchaser intends to use the "rights" in a TRPA-approved manner. *Without TRPA approval, there is no economic value of any consequence in Mrs. Suitum's parcel of land.* The fact that Mrs. Suitum retains title to the land is irrelevant. "While the government does not directly proceed to appropriate title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee

may be invested." *Lynah*, 188 U.S. at 470.

As this Court has recognized, "Property does not have rights. People have rights. The right to enjoy property . . . is, in truth, a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972). James Madison declared in 1792 that "as a man is said to have a right to this property, he may be equally said to have a property in his rights." PROPERTY, COMPTON'S INTERACTIVE ENCYCLOPEDIA, 1994.

As Justice Scalia noted aptly in *Lucas*, Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922) that "[i]f . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' *Id.*, at 415, 43 S.Ct., at 160." *Lucas*, at 1014, 112 S.Ct., at 2892-93. Indeed, the startling syllogism enunciated by Justice Holmes in *Mahon* takes on an even more apocalyptic tone when viewed in the context of this Court's complete integration of the Takings Clause into the penumbra of fundamental rights guaranteed by the fifth and fourteenth amendments to the Constitution of the United States. In the context of the instant case, Justice Holmes' admonition is nothing short of prophetic.

As a fundamental liberty and constitutionally protected right, an individual's ownership of property should be protected from the arbitrary discretion of the government. Mrs. Suitum's right to own,



use and enjoy her parcel of land has been restricted, monitored, and converted into a conditional privilege by an agency of government. Such conversion of interests violates the most basic tenets of property ownership, even at the very moment of imposition. "The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past." *Lucas*, 505 U.S. at 1032-1033, 112 S.Ct. at 2902 (Kennedy, concurring). This Court is presented with the opportunity to reaffirm the stature of the right to own and enjoy property unfettered as co-equal with all other constitutional rights, and to liberate the individual owner of property from the tentacled grasp of even the most circuitous of government invasions that cannot be condoned in this case without tacit endorsement of legislative legerdemain.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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